IN THE

Supreme Court of The United States

OCTOBER TERM, 1977

No. 76-930

DIXY LEE RAY, Governor of the State of Washington, et al.,

Appellants,

v.

ATLANTIC RICHFIELD COMPANY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLEES

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STATEMENT OF THE CASE

1. The Challenged State Statute

At issue in this case is the constitutional validity of Washington's "Tanker Law," Chapter 125 of the 1975 Laws of the State of Washington, Revised Code of Washington ("R.C.W.") §§ 88.16.170 *et seq.*[1] The Tanker Law regulates the size, design and navigation of oil tankers engaged in interstate and international trade — an area long subject to the paramount regulation of the federal government — for the stated purpose of protecting the State's waters from the risk of oil spills. R.C.W. § 88.16.170. The Tanker Law has three operative provisions:

[1] The Tanker Law is reproduced as Appendix I to Appellants' Jurisdictional Statement ("J.S."), at 30a-33a.

(1) Section 3(1) (the "Size Limit"), R.C.W. § 88.16.190(1), absolutely prohibits any oil tanker over 125,000 deadweight tons ("DWT") from entering Puget Sound.[2]

(2) Section 3(2) (the "Design Requirements"), R.C.W. § 88.16.190(2), prohibits any oil tanker between 40,000 DWT and 125,000 DWT from entering Puget Sound unless it has minimum shaft horsepower of one horsepower for each two and one-half DWT; twin screws; double bottoms underneath all cargo compartments; two radars, one of which must be collision-avoidance radar; and such other navigational systems as may be prescribed by the State Board of Pilotage Commissioners. A proviso to Section 3(2) (the "Tug Escort Proviso") waives compliance with the Design Requirements if the tanker is at all times under the escort of tugboats with an aggregate horsepower of five per cent of its deadweight tonnage.

(3) Section 2 (the "Pilotage Requirement"), R.C.W. § 88.16.180, provides that any oil tanker of 50,000 DWT or greater must employ a pilot licensed by the State of Washington while navigating Puget Sound.

Violation of the Tanker Law is a misdemeanor. R.C.W. § 88.16.150.

2. The Factual Background: The Tanker Law's Impact on Oil Transportation

Puget Sound is a large inlet of the Pacific Ocean which indents deep into western Washington. Roughly 120 miles long and up to 40 miles wide, this vast area of largely open water represents 65% of Washington

[2] Puget Sound is defined to include all waters east of a line between the Discovery Island light off Victoria, British Columbia, and the New Dungeness light east of Port Angeles on Washington's Olympic Peninsula. (See the navigation charts of record in the Appendix Attachment ("A.A.").)

waters and includes all the State's major ports, including Seattle and Tacoma. (A. 68, 73) The area thus blocked off by the Tanker Law is a major international waterway, sustaining extensive interstate and foreign commerce (A. 65), including that bound for Canadian ports in the Vancouver area. (A. 64) Included within Puget Sound — and thus barred to all tankers over 125,000 DWT — are all the State's refineries and oil docking or terminal facilities. (A. 47-48, 75).

Averaging over 200 feet in depth, Puget Sound is the deepest port area on the West Coast south of Alaska. (A. 50, 69; A.A.) There is at least 60 feet of water at all points along the route to Atlantic Richfield's Cherry Point refinery (A. 65), sufficient to accommodate tankers well in excess of the Tanker Law's Size Limit. Puget Sound's sheltered waters, wide and deep channels, and the Coast Guard's vessel traffic control system make it an excellent and safe port area.[3] Despite years of tanker operations in Puget Sound, there is no evidence that any tanker has ever had an oil spill during its transit of the Sound. (A. 80, 121-22).[4]

The Tanker Law impermissibly imposes local regulation upon what the three-judge court below correctly described as "this most interstate, even international, of transportation systems." (J.S. at 8a). The United

[3] Although occasionally subject to adverse weather, visibility in Puget Sound is less than one mile only 2% of the time and exceeds seven miles over 90% of the time. (Pre-trial Order Ex. I). Winds average only 6.7 miles per hour and exceed 18 miles an hour less than 3% of the time. (Ex. J).

[4] The one oil spill mentioned in the record – of 476 barrels – took place at dockside. (A. 84, 121-22). According to the "best information available" the only tanker casualties in Puget Sound – none of which was shown to involve an oil spill – involved vessels too small to be covered by the Tanker Law. (A. 121-22). Appellants cite Pre-trial Order Exhibit P as purported evidence of oil spills by tankers in transit. Brief of Appellants ("B.A.") at 16. No Exhibit P was ever submitted into the record.

States in 1975 imported over 35% of its oil requirements. (A. 57)[5] More than 80% of this imported oil is brought into this country by tanker (*Ibid*). The vast majority of these vessels — carrying 94% of U.S. tanker oil imports — are registered in and fly the flags of foreign nations. (A. 58).

Approximately two-thirds of the crude oil requirements of Atlantic Richfield's Cherry Point refinery are supplied by tanker deliveries from foreign sources (A. 45). All fifteen of the tankers over 125,000 DWT which called at Cherry Point prior to the Tanker Law's Size Limit, and most of the tankers between 40,000 and 125,000 DWT, were sailing under foreign registry. (A. 107-13). The Tanker Law applies to all such tankers regardless of the national flag they fly (A. 44).

Tankers over 125,000 DWT are now in general use throughout the world because of the significant transportation cost savings they provide — up to 50% on longer runs (A. 63-64). At the end of 1975 there were 727 tankers over 125,000 DWT in use, representing 59% of the world's total tanker capacity, and an additional 344 such vessels under construction (A. 58). All but four of the existing tankers over 125,000 DWT fly foreign flags. (*Id.*) The Size Limit permanently excludes all of these vessels from Puget Sound, regardless of the amount of oil they actually carry on any given voyage.[6] Atlantic Richfield would now be using tankers over 125,000 DWT to serve its Cherry Point refinery but for the Tanker Law's embargo (A. 46, 364-68).

In addition to receiving tankers engaged in foreign trade, Puget Sound ports will soon play a significant role in the transportation of oil from the North Slope of

[5] Oil imports have more recently approximated 50% of U.S. requirements. 123 Cong. Rec. S.8594 (daily ed. May 25, 1977).

[6] Deadweight tonnage is defined for purposes of the Tanker Law in terms of the cargo carrying capacity of the vessel. (A. 43)

Alaska to the lower 48 states. Oil has begun to flow through the Trans-Alaska Pipeline as this brief is being written, and is expected to reach its capacity of 2,200,000 barrels of oil per day by 1981 (A. 49). It is currently anticipated that all of this oil will be transported by U.S. flag tankers to ports on the West Coast, with approximately 15% destined for the Puget Sound area (A. 49, 88). Atlantic Richfield's Cherry Point refinery was specifically designed and built to refine North Slope crude oil (A. 45).

Plans to transport this oil to the lower 48 states rely substantially on the use of tankers over 125,000 DWT. Docking facilities at Valdez, Alaska, at the southern terminus of the Trans-Alaska Pipeline, have a depth of at least 75 feet of water, and are designed to accommodate fully loaded tankers of up to 250,000 DWT (A. 49). One-third of the tankers to be employed in the Alaska trade — and a larger percentage of the total tanker capacity — will be in excess of 125,000 DWT (A. 50). In addition to Puget Sound, the Port of Long Beach, California — which can also accommodate fully loaded tankers over 125,000 DWT (A. 52), and plans to expand this capacity (A. 50) — is expected to receive a substantial percentage of North Slope crude. (A. 49). Atlantic Richfield utilizes tankers over 125,000 DWT at Long Beach to serve its Carson, California refinery. (A. 52, 115).[7]

Atlantic Richfield at the time of trial had five large new tankers under construction, at a cost of over $250 million (A. 53-54). Two U.S. flag tankers of approximately 150,000 DWT under construction in San Diego are in-

[7] Although most East and Gulf Coast ports are too shallow to permit entry of fully loaded tankers over 125,000 DWT, Atlantic Richfield has received the necessary governmental approvals to go forward with its plans to modify the docking facilities at its Philadelphia refinery to accommodate lightered (i.e., partially off-loaded) tankers up to and including 150,000 DWT, and has similar plans to modify the docking facilities serving its Houston refinery (A. 52).

tended for use in transporting North Slope oil to West Coast ports, including Puget Sound (A. 53). Three foreign flag tankers — two of approximately 150,000 DWT and one of 120,000 DWT — intended for use in delivering foreign crude oil to Atlantic Richfield's U.S. refineries were then under construction and scheduled for completion this year. (A. 54).[8]

At present, Atlantic Richfield is the only refiner in the Puget Sound area with docking facilities capable of accommodating fully loaded tankers over 125,000 DWT (A. 46-48). Prior to the passage of the Tanker Law, however, both Mobil and Shell had announced planned extensions of their docking facilities into deeper waters to accommodate fully loaded tankers of 150,000 DWT and 200,000 DWT, respectively (A. 47-48). Shell has two U.S. flag tankers of 188,000 DWT under construction, intended for use in the Alaska trade (A. 54). Mobil, Shell and Texaco all own a substantial number of foreign flag tankers in excess of 125,000 DWT which, absent the Tanker Law and with modification of docking facilities, could be used to bring foreign crude oil to their Puget Sound refineries (A. 53).[9]

No tanker in the world meets all the Tanker Law's Design Requirements (A. 66), and it is not economically

[8] Atlantic Richfield has in fact taken delivery of the three tankers previously under construction in Japan – the "ARCO Independence", "ARCO Discovery" and "ARCO Mariner" – and, due to a change in contractual arrangements, all three are approximately 150,000 DWT. These vessels, registered in Liberia, are now being used to bring foreign crude to Long Beach and would be used to serve Cherry Point were it not for the Tanker Law. (*See* A. 368).

[9] Appellee Seatrain Lines, a shipping and shipbuilding firm, owns or operates twelve tankers, four of which are foreign flag tankers over 125,000 DWT which are excluded from Puget Sound by the Tanker Law's Size Limit. (A. 53) Seatrain has constructed two 225,000 DWT tankers with the aid of U.S. Maritime Administration subsidies (A. 58-60), and has two other subsidized 225,000 DWT tankers under construction at a cost of $175 million. (A. 54-55, 61-62).

feasible to retrofit an existing tanker to meet these requirements. (A. 67). The cost of compliance with the Design Requirements for a new tanker is immense — double bottoms and twin screws alone would add roughly $8.8 million to the cost of a 150,000 DWT vessel. (A. 54, 62) More fundamentally, flexibility in deployment of tankers is essential (A. 62-63), and it is not realistically possible to commit the enormous capital investment involved in new tanker construction (A. 54, 61-62) to meet the particular design requirements of a single port when other states or localities may impose additional or different requirements. As a result, each of the tankers calling at Cherry Point since the effective date of the Tanker Law has been required to pay the penalty it exacts for non-compliance with its Design Requirements — to employ a fleet of tugboats to escort the tanker to Cherry Point through 45 miles of largely open water. (A. 44, 46, 64, 67; A.A.).

Washington's Tanker Law cannot stand in the face of the clear need for uniform national regulation of tanker design and navigation recognized by Congress in the Ports and Waterways Safety Act ("PWSA"). As the amicus briefs filed in this case on behalf of 16 states attest, many other states are likewise concerned about the environmental impact of increased tanker traffic resulting from both the opening of the Trans-Alaska Pipeline and increasing U.S. oil imports, and are likely to enact comparable legislation if the Tanker Law is upheld. (*See generally* A. 95-96, Pre-trial Order ¶ 153).[10] This risk of proliferating state and local tanker regulation is real, not hypothetical. Already, Alaska has enacted its own tanker law, Chapter 266, 1976 Laws; Alaska Stat. § 30.20.010 *et seq.* (Supp. 1976), which prescribes a different and inconsistent set of design requirements and

[10] The bulk of paragraph 153 and the remainder of the Pretrial Order were inadvertently omitted from the Appendix in printing.

encourages rather than prohibits use of tankers over 125,000 DWT.

3. Proceedings Below

Atlantic Richfield filed this lawsuit on September 8, 1975, the day the Tanker Law went into effect. Atlantic Richfield's complaint alleged that the Tanker Law was preempted by the Ports and Waterways Safety Act; conflicted with the PWSA and various other federal statutes; and unconstitutionally burdened interstate commerce and interfered with federal regulation of foreign affairs. Named as defendants were Washington Governor Daniel J. Evans and other state and local officials responsible for enforcement of the Tanker Law.[11] Because substantial issues under the Commerce Clause and foreign affairs provisions of the Constitution were raised by the complaint, a three-judge court was convened.

The case was briefed and argued before the three-judge court on June 25, 1976, on the basis of a detailed stipulation of facts embodied in a Pre-Trial Order filed April 6, 1976 (A. 39-359). The court also had before it briefs filed by the United States as *amicus curiae* in support of its contention that the Tanker Law was preempted in its entirety by the PWSA.

The three-judge court issued its opinion and order holding the Tanker Law invalid on September 24, 1976. The court held that Sections 3(1) and 3(2) of the Tanker Law — the Size Limit, Design Requirements and Tug Escort Proviso — were preempted by the comprehensive and exclusive federal scheme established by the PWSA for regulating the navigation and design of tankers.

[11] Seatrain Lines, Inc., intervened as a plaintiff and joins with Atlantic Richfield in this brief. Four environmental organizations and the King County (Seattle) Prosecuting Attorney intervened as defendants.

J.S. at 7a-8a.[12] The three-judge court further held that Section 2 of the Tanker Law, the Pilotage Requirement, was invalid as applied to tankers engaged in the "coastwise" (domestic) trade because it conflicts with 46 U.S.C. §§ 215, 364. J.S. at 9a.[13] The court, relying on *Ex parte Young*, 209 U.S. 123 (1908), also denied the motion of the defendant State officials to dismiss the complaint on Eleventh Amendment grounds. J.S. at 6a.

The three-judge court initially declined to enter injunctive relief on the presumption that the defendant State officials would respect a declaratory judgment. *Id.* at 12a. As soon as it became apparent that the defendants intended to continue enforcement of the statute notwithstanding the court's ruling, Atlantic Richfield moved for supplementary injunctive relief. After a hearing on November 12, 1976, the three-judge court issued an order enjoining enforcement of the Tanker Law. J.S. at 4a. The injunction was stayed by Mr. Justice Rehnquist, 429 U.S. 1334 (December 9, 1976), and then by the Court on January 10, 1977, pending final disposition of this appeal.

[12] The three-judge court found it unnecessary to address the other issues raised by Atlantic Richfield in its challenge to Sections 3(1) and 3(2) of the Tanker Law. J.S. at 12a.

[13] Appellants now concede the invalidity of the Pilotage Requirement as applied to enrolled vessels engaged in coastwise trade. B.A. at 10 n.9. Atlantic Richfield has never contended that state pilotage requirements are invalid as applied to registered vessels (i.e., engaged in foreign trade). See 46 U.S.C. §§ 211, 213; PWSA § 101(5). There is thus no dispute of substance between the parties on this point.

The question remains as to the proper disposition of this appeal insofar as it concerns Section 2 of the Tanker Law. Washington law elsewhere requires state-licensed pilots on all vessels, R.C.W. § 88.16.070, but this provision exempts enrolled vessels, as required by federal law. The only effect of Section 2 of the Tanker Law, as is plain on its face, was to remove this exemption for enrolled tankers of 50,000 DWT or more. The three-judge court was thus correct to enjoin enforcement of Section 2 in its entirety and its judgment should be affirmed in this respect. Not surprisingly, appellants did not raise any issue as to the propriety of the three-judge court's action on this point in their Jurisdictional Statement.

The Court noted probable jurisdiction on February 28, 1977.

QUESTIONS PRESENTED

1. Was the three-judge court correct in holding that Sections 3(1) and 3(2) of Washington's Tanker Law are invalid under the Supremacy Clause because they seek to regulate an area preempted by federal law, particularly the Ports and Waterways Safety Act?

2. Even if not preempted, is the Tanker Law invalid under the Supremacy Clause because it conflicts with the PWSA and its implementation by the Coast Guard; with the federal vessel registration, enrollment and licensing laws; and with the Maritime Administration's Tanker Construction Program?

3. Is the Tanker Law invalid under the Commerce Clause because it invades a field where uniform federal regulation is essential?

4. Is the Tanker Law invalid under the constitutional treaty-making and foreign affairs powers because uniform federal control of foreign policy and treaty negotiation is required?

5. Should *Ex parte Young*, 209 U.S. 123 (1908), be overruled?

SUMMARY OF ARGUMENT

Washington's Tanker Law is a giant step toward Balkanization of regulatory authority over seagoing oil transportation. Congress enacted the Ports and Waterways Safety Act of 1972 to ensure stringent federal regulation of oil tankers to prevent marine pollution. In so doing, Congress recognized the compelling need for uniform regulation of tanker size, design and navigation, and acted to preempt state regulation such as the Tanker Law.

The two overlapping titles of the PWSA authorize comprehensive Coast Guard regulation of vessel traffic and navigational controls as well as tanker design and equipment. The Coast Guard has fully implemented this authority, attacking its oil spill prevention responsibilities from all angles. Coast Guard regulations establish a vessel traffic control system in Puget Sound, which includes restrictions on large tankers but permits their passage, and impose selective tug escort requirements, thereby effectively rejecting the Tanker Law's Size Limit and Tug Escort Proviso. The Coast Guard has also established comprehensive regulations covering the design and equipment of tankers for protection of the environment, and in so doing has rejected each of the particular Design Requirements of the Tanker Law.

Examination of the PWSA, its legislative history and economic context can leave no reasonable doubt that Congress intended to preempt state regulation. Section 102(b) of the Act explicitly provides that Title I permits state regulation "for structures only" and was intended to "make it absolutely clear . . . that State regulation of vessels is not contemplated." Title II merely amended the existing scheme of "uniform" regulation of tanker design and equipment to expand its purposes to include protection of the environment as well as vessel safety. Congress was concerned about the international consequences of unilateral tanker regulation by the United States in light of ongoing negotiations to achieve international standards of tanker design, and could not possibly have intended to allow each of the states to establish its own standards. Any state regulation in this area necessarily interferes with the Coast Guard's balancing of environmental considerations against concern for safety, cost, effectiveness, and maintenance of the flow of commercial traffic.

The Tanker Law's Size Limit is invalid whether viewed as a form of vessel traffic regulation or as a

tanker design requirement. The Law's combination of Design Requirements and Tug Escort Proviso is an invalid attempt to regulate tanker design by penalizing or burdening noncompliance with the state-prescribed design features. Even if viewed in isolation, the Tug Escort Proviso is preempted by the PWSA and Coast Guard regulatory actions in the tug escort area.

In addition to the preemption holding relied upon by the three-judge court, its judgment should be affirmed on any of several alternative grounds: The Tanker Law conflicts with the PWSA as it has been implemented by the Coast Guard, and with the rights granted by the permits and certifications held by tankers under the Tank Vessel Act as amended by the PWSA. The Size Limit conflicts with the rights granted by the federal vessel registration, enrollment and licensing laws which prohibit a state from excluding a licensed vessel from its waters, and with the Merchant Marine Act of 1970 under which the Maritime Administration has spent hundreds of millions of dollars to subsidize construction of the large tankers Washington seeks to exclude. The Tanker Law is invalid under the Commerce Clause because of the need for uniformity in regulation of tanker design and equipment, and interferes with the exclusive federal foreign affairs powers by jeopardizing continuing efforts to reach international agreement on tanker design standards.

ARGUMENT

I. THE PORTS AND WATERWAYS SAFETY ACT PREEMPTS STATE REGULATION OF TANKER SIZE, DESIGN AND NAVIGATION FOR PROTECTION OF THE MARINE ENVIRONMENT

A. The Coast Guard is Actively and Fully Regulating the Field of Tanker Size, Design and Navigation Under the Ports and Waterways Safety Act and Has Dealt with Each Feature of the Tanker Law

The Ports and Waterways Safety Act was enacted in 1972, Pub. L. No. 92-340, 86 Stat. 424, to establish a comprehensive scheme of federal regulation of tanker design, construction and operation to prevent oil spills. *See* S. Rep. No. 92-724, 92nd Cong., 2d Sess. (1972) (hereinafter the "Senate Report"), at 7-10. Like the Washington legislature, Congress was concerned about the environmental implications of increased tanker traffic and the increasing size of modern oil tankers. *Id.* at 12-13. The PWSA and Coast Guard regulations promulgated thereunder fully regulate the field of tanker size, design and movement, the subjects of Washington's Tanker Law. Indeed, the Coast Guard has dealt with each of the features of the Tanker Law, and in large part rejected them, in the exercise of its regulatory authority under the PWSA.

The PWSA has two titles, representing two overlapping approaches to protection of the marine environment. Title I deals primarily with vessel traffic controls, while Title II focuses on tanker design.

Title I of the PWSA, now codified at 33 U.S.C. §§ 1221 *et seq.*, authorizes the Coast Guard to establish vessel traffic control systems, PWSA § 101(1), 33 U.S.C. § 1221(1); to prescribe navigational equipment, PWSA § 101(2), 33 U.S.C. § 1221(2); to establish tanker size limitations or operating conditions, PWSA § 101(3)(iii), 33 U.S.C. § 1221(3)(iii); and to restrict operation of tankers not having particular operating capabilities. PWSA § 101(3)(iv), 33 U.S.C. § 1221(3)(iv).

Title II of the PWSA amended the Tank Vessel Act, 46 U.S.C. § 391a, to authorize the Coast Guard to adopt uniform federal regulations for the design, construction, equipment and operation of tankers. PWSA § 201(3), 46 U.S.C. § 391a(3); *see* Senate Report at 7. Congress

specifically directed the Coast Guard to adopt design and construction standards to improve tanker maneuvering and stopping ability, to reduce the possibility of collisions or groundings, and to limit cargo loss in the event of an accident. PWSA § 201(7), 46 U.S.C. § 391a(7).

The Coast Guard has fully implemented its regulatory powers under Title I in Puget Sound. The Coast Guard has established a mandatory vessel traffic control system ("VTS") in Puget Sound. 39 Fed. Reg. 25430 (July 10, 1974), 33 C.F.R. Part 161 Subpart B (1976), as amended, 42 Fed. Reg. 29480 (June 9, 1977). (See A. 65, 155-198.) The VTS establishes a network of one-way traffic lanes throughout Puget Sound, each 1000 yards wide and separated by zones 500 yards wide, which are plainly marked on the navigation charts in the Appendix. (A.A.) In Rosario Strait — the only confined portion of the route to Atlantic Richfield's Cherry Point refinery — a single traffic lane has been established, and the Coast Guard prohibits the passage of more than one tanker over 70,000 DWT in either direction at any given time, a size limitation which is reduced to 40,000 DWT in adverse weather (A. 65). The VTS requires use of radiotelephone equipment to maintain continuous vessel communications contact with the Coast Guard's Vessel Traffic Center in Seattle, and regular reporting of the vessel's position, speed, and other pertinent data. The regulations also authorize the Vessel Traffic Center to assume direct control of vessel movement if necessary during periods of adverse weather or congestion, an authority the Coast Guard anticipates will be exercised "primarily in harbor areas and in and around Rosario Strait." 38 Fed. Reg. 21228, 21229 (Aug. 6, 1973).[14]

[14] The Coast Guard recently established the Prince William Sound VTS to serve Valdez, Alaska. 42 Fed. Reg. 37928 (July 25, 1977). Vessel traffic systems are also in place in San Francisco, Houston/Galveston, Louisville and portions of the Gulf Intercoastal Waterway, and are under development in New York and New Orleans. *See Hearings on Vessel Traffic Control before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 94th Cong., 2d Sess., Ser. No. 94-39 (1976) (hereinafter "*Vessel Traffic Control Hearings*"), at 189-92.

Coast Guard regulations under Title I also empower its local District Commanders and Captains of the Port to exercise authority under PWSA § 101(3), including the power to exclude tankers over a given size or to condition tanker operations on use of tug escorts if the Coast Guard officers determine that weather conditions, vessel traffic congestion or other circumstances make such restrictions necessary for safe operation. 40 Fed. Reg. 6653 (Feb. 13, 1975), 33 C.F.R. Part 160. The Puget Sound Captain of the Port is in fact exercising this authority, and has imposed tug escort requirements in Rosario Strait on LPG (liquefied petroleum gas) tankers and at least one other vessel. (See the Appendix to this brief at pp. A-3, 8, 11-12 *infra*.)

Coast Guard adoption of generally applicable standards of tug assistance for tankers operating in confined waters is under active consideration, Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976), and will be the subject of a rulemaking proceeding in the near future. 42 Fed. Reg. 5956, 5958 (Jan. 31, 1977).[15]

The Coast Guard has also fully exercised its authority under the PWSA to prescribe tanker design and equipment requirements. The Coast Guard earlier this year promulgated navigational safety regulations under Title I which require all tankers to have radar, magnetic compass, gyrocompass, depth sounding devices and other prescribed navigational equipment. 42 Fed. Reg. 5956 (Jan. 31, 1977), 33 C.F.R. Part 164.[16] At the same time

[15] Proposed requirements for minimum underkeel clearance are also under consideration. *Id.* at 5957; *see* Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18771 (May 6, 1976).

[16] These navigation safety regulations also require tankers to have the latest available navigational charts and publications; to post the vessel's maneuvering and stopping capabilities; to test

the Coast Guard issued proposed regulations to add LORAN-C radio-navigation systems to the list of required equipment. Notice of Proposed Rulemaking, 42 Fed. Reg. 5966 (Jan. 31, 1977).[17]

Coast Guard regulations under Title II establish tanker design standards for U.S. and foreign flag vessels. 40 Fed. Reg. 48280 (Oct. 14, 1975), 41 Fed. Reg. 1479 (Jan. 8, 1976), and 41 Fed. Reg. 54177 (Dec. 13, 1976), 33 C.F.R. Part 157. The regulations are based largely on the provisions of the International Convention for the Prevention of Pollution from Ships, adopted in 1973 by the Inter-Governmental Maritime Consultative Organization ("IMCO"), the maritime arm of the United Nations, and currently awaiting ratification by member nations. The regulations require new tankers over 70,000 DWT to have segregated ballast tanks, carrying only water, which must be so located as to provide protection against oil spillage in the event of accident. They also impose limitations on cargo tank arrangement and size, and establish structural subdivision and damage stability requirements intended to reduce oil loss in the event of accident.

During the course of its development and promulgation of these regulations, the Coast Guard considered and expressly rejected requirements for double bottoms, twin screws, extraordinary horsepower, and a second radar with collision-avoidance capability — all the Design Requirements of the Tanker Law. As discussed in detail below, these Design Requirements were rejected for a variety of reasons, including doubts as to their efficacy and the need for uniform international design standards.

steering, communications and propulsion systems within 12 hours before entering or getting underway in U.S. waters; and to follow prescribed navigation rules.

[17] The Coast Guard has also indicated that an offshore tanker routing system between Valdez and West Coast ports, utilizing such long range navigation equipment, is under development. *Vessel Traffic Control Hearings* at 192.

See United States Coast Guard, Final Environmental Impact Statement, Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade (Aug. 15, 1975) (A. 207-333) (hereinafter "Coast Guard EIS"), at A. 215-21, 277-310.

Renewed concern over tanker safety has spawned a second wave of Coast Guard rulemaking proceedings. The Coast Guard has published proposed regulations to carry out the initiatives recommended by President Carter in his message to Congress on tanker pollution control. *See* 13 Weekly Comp. of Pres. Docs. 408 (Mar. 18, 1977). These proposed regulations would require new tankers over 20,000 DWT, delivered in 1982 or later, to have segregated ballast tanks and double bottoms, and existing tankers over 20,000 DWT to be retrofitted with segregated ballast tanks by 1982. 42 Fed. Reg. 24868 (May 16, 1977). The proposed regulations would also require tankers over 10,000 DWT to have a second radar system with collision-avoidance capability. 42 Fed. Reg. at 24871.[18]

B. The PWSA and Its Legislative History Establish Congressional Intent to Preempt State Regulation

Where Congress has intended its regulation of an aspect of commerce to be exclusive, state regulation is invalid under the Supremacy Clause, even though the state law might be said to complement the purposes of federal law. *Jones v. Rath Packing Co.*, 45 U.S.L.W.

[18] The proposed regulations also extend requirements for inert gas systems to prevent tanker explosions, which requirements are currently imposed on tankers over 100,000 DWT, 41 Fed. Reg. 3843 (Jan. 26, 1976), 46 C.F.R. Part 32.53 (1976), to all tankers over 20,000 DWT, 42 Fed. Reg. at 24874, and require improved tanker emergency steering standards, *id.* at 24869. The Coast Guard has also recently proposed regulations to upgrade tanker personnel qualifications. 42 Fed. Reg. 21190 (Apr. 25, 1977).

4323, 4324-25 (U.S. Mar. 29, 1977); *Campbell v. Hussey*, 368 U.S. 297, 302 (1961); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956). Congressional intent to preempt state regulation may be explicit in the statute or its legislative history, or may be implied from the nature of the subject matter, the need for uniform national regulation, the dominance of the federal interest at stake, or the pervasiveness of the federal regulatory scheme. *Jones v. Rath Packing Co., supra; City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146-47 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

Examination of the PWSA, its legislative history and economic context can leave no reasonable doubt that Congress intended to occupy the field and preempt state regulation of oil tanker size, design and navigation for the purpose of protecting the marine environment. Together, the two titles of the PWSA establish a "systems approach" intended "to deal with the *total* tanker oil pollution problem." Senate Report at 14 (emphasis added).

1. Section 102(b) of the PWSA Expressly Preempts State Regulation of Vessels

Section 102(b) of the PWSA, 33 U.S.C. § 1222(b), was expressly intended to make "absolutely clear" congressional intent to preempt state regulation of vessels. H.R. Rep. No. 92-563, 92d Cong., 1st Sess. (1971) (hereinafter "House Report"), at 15. Section 102(b) provides that Title I does not "prevent a State or political subdivision thereof from prescribing *for structures only* higher safety equipment requirements or safety standards." (Emphasis added.)

During hearings on the bill as originally introduced in 1970, Congressman Downing expressed concern that "each of the coastal States [might impose] different

types of regulations and requirements so that an incoming vessel would be in a state of confusion." *Hearings on Port and Harbor Safety before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., Ser. No. 91-34 (1970) (hereinafter *"1970 House Hearings"*), at 27-28. Coast Guard witnesses presenting the proposed legislation responded that it was not intended to permit the states to impose such differing standards on vessels, and agreed that the bill should be amended to make that intention clear. *Id.* at 28. *See also id.* at 301 (bill to be redrafted "to make crystal clear that this [state authority in § 102(b)] was to apply to land and not to vessels at all").

Moreover, the Chairman of the National Transportation Safety Board — whose recommendations played a major role in development of Title I, Senate Report at 13 — urged adoption of uniform federal regulation of vessels because state regulation "could result in a patchwork quilt approach which would lack standard frequencies and equipment and would place a greater burden upon ships than a federally-regulated program. . . . [A] federally-controlled program would minimize the variety of requirements both foreign and domestic shipping would have to meet." *Hearings on Port and Harbor Safety before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., Ser. No. 92-12 (1971) (hereinafter *"1971 House Hearings"*), at 348-49. See also *1971 House Hearings* at 377 (Statement of Appellant Sierra Club urging "[n]ational, uniform Federal action"); *id.* at 141, 170-72, 186.

Indeed, during the committee hearings several congressmen specifically mentioned the need to preempt state regulation of vessels so as to prevent a state from im-

posing an absolute limitation on the size of tankers permitted to operate in its waters, as Washington has attempted to do here. For example, Congressman Keith declared that state laws "banning giant tankers" should not be permitted, saying that "[w]e do not want the States to resort to individual actions that adversely affect our national interest." *Id.* at 30. Congressman Tiernan agreed, adding that such a size limit would require "more vessels in carrying the fuels we need for our demands in keeping the economy going." *Id.* at 32. See also *id.* at 172; *Hearings on the Navigable Waters Safety and Environmental Quality Act Before the Senate Committee on Commerce*, 92d Cong., 1st Sess., Ser. No. 92-39 (1971) (hereinafter, *"Senate Hearings"*), at 81 (Statement of Senator Inouye); Senate Report at 33.

The House Committee Report explains that it was amending Section 102(b) to make explicit congressional intent to preempt state regulation of vessels:

"This amendment was suggested since it was felt that H.R. 8140 does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. *The inserted language is a positive statement* retaining State jurisdiction over structures and *making clear that State regulation of vessels is not contemplated.*" House Report at 15 (emphasis added).[19]

[19] The Committee report goes on to explain:

"Last year in the hearings on H.R. 17830, Subcommittee Counsel asked the Coast Guard [Chief] Counsel whether it was the intention of the Coast Guard that States should prescribe safety equipment standards for vessels. The Coast Guard witness said that it was their intention that *higher vessel equipment regulations and standards by States should apply to structures only and not to vessels.* He agreed that the language of H.R. 17830 was not clear in this regard and that we should put some clarifying language in the section.

"Your Committee adopted the suggested language since it will make clear the intent mentioned above." House Report at 15 (emphasis added).

It is difficult to imagine a more forceful statement of congressional intent to preempt state regulation of tankers, including state-imposed size limitations. The Coast Guard has fully exercised its regulatory authority under Title I and has, in particular, established a comprehensive vessel traffic control system for Puget Sound. There is not the slightest indication that Congress intended subsequent state regulation like Washington's Tanker Law to stand in the face of such extensive Coast Guard regulation. On the contrary, the House Committee Report declared that "one of the strong points of the legislation is the imposition of federal control in the areas envisioned by the bill which will insure regulatory and enforcement uniformity throughout all the covered areas." House Report at 8.[20]

The sole continuing state authority over vessel movement recognized by Congress in the PWSA was state regulation of pilotage on vessels in foreign trade, PWSA § 101(5), a historical anomaly dating back to the First Congress, 1 Stat. 54 (1789); *see Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851). Otherwise, the only role carved out by Congress for state and local authorities in the regulation of vessels is the right to be consulted and comment upon proposed *federal* regulations. PWSA § 104.[21]

[20] In light of the PWSA's legislative history, the recent remarks of Senator Magnuson of Washington attacking the decision of the court below are entitled to no weight. As the Court recently observed, "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

[21] Appellants argue that Title I leaves room for state action because Congress limited the Coast Guard's power to control vessel traffic to hazardous or congested areas. B.A. at 44-46. However, this "limitation" simply reflects congressional intent that the Coast Guard, unlike an air traffic controller, should not assume direct control of vessel traffic in all circumstances. Senate Report at 32; House Report at 8-9. The principal purpose behind this limitation of Coast Guard authority was to

2. Congressional Intent to Preempt State Regulation Is Manifest in Title II and its Legislative History

The congressional intent to preempt state tanker regulation in Title I is reinforced in Title II of the PWSA and its legislative history. As the court below held, J.S. at 8a, the purpose of Title II was to establish uniform federal regulations governing the design, construction and operation of tankers for the protection of the marine environment.

The necessity for uniform federal regulation of maritime affairs has been recognized since the nation's founding. *See generally* Constitution Art. III, § 2, cl. 1; *The Lottawanna*, 88 U.S. 558, 575 (1875); *Gibbons v. Ogden*, 22 U.S. 1, 190 (1824). The need for national uniformity is nowhere more compelling than with regard to the design, construction and operation of the vessels of interstate and foreign trade themselves. *See Kelly v. Washington*, 302 U.S. 1, 14-15 (1937), quoted at p. 58 *infra*. In response to this need for uniform regulation, Congress, starting with the first vessel inspection laws, 5 Stat. 304 (1838), and continuing to the present, has established a comprehensive scheme of federal regulation of vessel design, construction and operation. 46 U.S.C. §§ 361 *et seq*. The basic features of this scheme include required compliance with extensive Coast Guard regulations relating to ship design, construction and equipment, *see generally* Title 46 C.F.R.; Coast Guard approval

preserve some of the traditional independence and authority of vessel masters and pilots. House Report at 9. There is no evidence that Congress intended to leave the door open for the states to impose even greater intrusions on these traditional responsibilities.

In any event, the Puget Sound VTS was established upon the Coast Guard's determination that the area "is subject to congested vessel traffic and hazardous weather conditions." 38 Fed. Reg. at 21228. Appellants cannot seriously contend that the Coast Guard lacks authority under Title I to control vessel traffic in Puget Sound.

of construction plans for all new vessels, 46 C.F.R. §§ 2.90-1, 31.10-5; regular and complete Coast Guard vessel inspection, 46 U.S.C. §§ 391(b), 392(c); and issuance of required permits and certificates upon Coast Guard approval, 46 U.S.C. § 399. *See generally* Gilmore & Black, The Law of Admiralty 986-87 (2d ed. 1975). There can be little doubt that this complex regulatory scheme preempts state laws within the proper scope of its regulation. *Kelly v. Washington, supra*, at 4; *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444-45 (1960); compare *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

In 1936, Congress made oil tankers subject to this comprehensive regulatory scheme with passage of the Tank Vessel Act, 49 Stat. 1889, 46 U.S.C. § 391a. Section 2 of the 1936 Act granted the Coast Guard authority to promulgate regulations establishing standards of tanker design, construction, equipment and operation, *see* 46 C.F.R. Subchapter D, in terms almost identical to those of Section 201(3) of the PWSA, but principally for the purpose of protecting "life and property." *See* Senate Report at 21.

The purpose of the original Tank Vessel Act was to establish "a reasonable and uniform set of rules and regulations concerning ship construction, equipping, [and] operation . . ." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936). Congress found this legislation necessary to correct a situation where some vessels were subject to "more stringent" regulations than others, "whereas it was the intention to have uniform application." *Ibid. See also Hearings on H.R. 12840 Before the House Committee on Merchant Marine and Fisheries*, 74th Cong., 2d Sess. 3-5 (1936).

Title II of the PWSA merely amended the Tank Vessel Act to add express Coast Guard authority to adopt such uniform regulations for the purpose of protection of the

marine environment as well as for vessel safety. Senate Report at 26. In so doing, Congress did not indicate any intention to change the preemptive effect of the Tank Vessel Act. *Compare Jones v. Rath Packing Co.*, *supra*, at 4328. On the contrary, the legislative history of Title II emphasizes that the statute was intended to establish a "comprehensive" scheme of federal regulation. Senate Report at 7-10, 13, 20-22, 29.[22]

Title II's directive to the Coast Guard to establish "comprehensive minimum standards" of tanker design and construction does not indicate any intent to allow state regulation in this area. Use of the word "minimum" merely signifies congressional intent to leave the nuts and bolts of ship construction where they have always been, with the ship owner or shipbuilder, subject to compliance with Coast Guard regulations. In this sense, all of the Coast Guard's detailed regulations on vessel construction for purposes of vessel safety under the federal inspection laws and the original Tank Vessel Act are likewise "minimum standards." Congress has repeatedly used the term "minimum standards" in just this sense in other laws where, as here, preemption was intended.[23] *See, e.g.*, Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671 *et seq.*; *Tennneco, Inc. v. Public Service Comm'n*, 489 F.2d

[22] Significantly, when concern subsequently arose over the safety of the tankers to be employed in carrying North Slope oil to West Coast ports, Congress responded by advancing to June 30, 1974, the deadline, contained in Section 7(C) of Title II, 46 U.S.C. § 391a(7)(C), for the adoption *by the Coast Guard* of regulations for tankers in domestic trade, Trans-Alaska Pipeline Authorization Act § 401, Pub. L. No. 93-153, 87 Stat. 589 (1973), rather than authorizing state regulation of tanker size, design or operation. *See* 119 Cong. Rec. 22836-39 (1973).

[23] The Court in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963), did not state that use of the term "minimum standards" was "strong evidence" of congressional intent to allow state regulation, as appellants claim. B.A. at 36 n.41. The Court in *Florida Lime* merely recognized that use of such terminology "cannot be said, without more, to reveal a design that federal marketing orders should displace all state regulations." 373 U.S. at 147-48.

334, 336 (4th Cir. 1973), *cert. denied*, 417 U.S. 946 (1974); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 *et seq.* Indeed, the court below used the term "minimum design specifications" in this sense in describing the Tanker Law. J.S. at 8a.[24]

3. Congressional Intent to Preempt State Regulation Is Demonstrated by the PWSA's Recognition of the Need for Uniform International Standards

Congressional intent to preempt state regulation is also demonstrated by the recognition in the PWSA and its legislative history of the need for uniform international standards. Congress was well aware that unilateral tanker regulation by the United States raised difficult and diplomatically sensitive foreign relations questions. The Departments of State and Transportation expressed concern that unilateral imposition of design and construction standards by the United States on foreign flag vessels might violate our obligations under the International Convention for the Safety of Life At Sea ("SOLAS"), 16 U.S.T. 185, T.I.A.S. 5780, 536 U.N.T.S., 27 (1960),[25] and would undermine the United States' ef-

[24] The Merchant Marine Act of 1970, 46 U.S.C. § 1101 *et seq.*, also evidences federal preemption of the field of tanker size and design. The Maritime Administration (MarAd) is responsible for determining the size, design and equipment of tankers to be subsidized under the Act, *see* 46 U.S.C. § 1121, and must approve tanker construction plans. 46 U.S.C. § 1151. The PWSA requires coordination between the Coast Guard and MarAd in development of federal tanker design standards. PWSA § 201(4), 46 U.S.C. § 391a(4). Additional state-prescribed design requirements beyond those required by MarAd would vitiate the tanker construction program and nullify the recent expenditure of more than $500 million in public funds to subsidize construction of tankers which do not comply with the Tanker Law's Design Requirements. *See* Brief for the United States as Amicus Curiae ("Br. U.S.") at 29-31.

[25] SOLAS specifies international standards of ship design, construction and required equipment and requires U.S. acceptance of certificates of inspection issued by the vessel's flag nation. Chapter I, Regulation 17. While its standards are

forts to achieve international agreement on uniform standards of tanker design, equipment and operation at the then-impending 1973 IMCO Marine Pollution Conference. Senate Report at 44-45, 48-51. Moreover, twelve foreign governments officially protested the prospect of unilateral tanker regulation by the United States. *Id.* at 40-41.

Congress recognized that these were "justifiable concerns." *Id.* at 22. The Senate Commerce Committee agreed that "this has traditionally been an area for international rather than national action," and that "multilateral action . . . would be far preferable to unilateral imposition of standards" since "the problem of marine pollution is world-wide." *Id.* at 23. Accordingly, Title II was amended in two significant respects. First, in Section 7(C), 46 U.S.C. § 391a(7)(C), Congress postponed the earliest effective date of design regulations under Title II until after the IMCO Conference, and authorized the Coast Guard further to delay implementation of these regulations for foreign flag tankers in order to allow additional time for development of international standards. *See* H.R. Rep. No. 92-1178, 92d Cong., 2d Sess. (1972) (hereinafter "Conference Report"), at 12-13. Second, Section 7(C) authorized the Coast Guard to defer to internationally adopted standards "which generally address the regulation of similar topics for the protection of the marine environment," even though such standards might not be the same as those initially proposed by the Coast Guard. *See* Senate Report at 28; Conference Report at 13.[26]

primarily intended to enhance vessel safety, as a practical matter they also protect the marine environment and it "would be exceedingly difficult to generate any environmental protection design or construction requirement, regardless of its label, which did not infringe into an area of SOLAS concern." Senate Report at 49; *see id.* at 45.

[26] The regulations adopted by the Coast Guard under the PWSA in fact defer substantially to the standards of the 1973 IMCO Marine Pollution Convention. The Coast Guard EIS explains that unilateral United States action would jeopardize ratification of the Convention by other nations and risk other adverse international repercussions. (A. 215-25, 330-31). *See* p. 63 *infra*. The Coast Guard's second round of regulatory proposals under the PWSA has been submitted to IMCO for consideration at a major international conference to be held in February 1978. *See* Statement of Secretary of Transportation Adams to the IMCO Council, May 23, 1977, reprinted at 123 Cong. Rec. S. 8741 (daily ed. May 26, 1977); 123 Cong. Rec. S. 8602 (daily ed. May 25, 1977); IMCO Circular Letter No. 388 (May 23, 1977).

In the face of this desire for international uniformity, it is inconceivable that Congress could have intended to allow independent action by the individual states, which possess neither sensitivity to the international implications of unilateral tanker regulation nor the capacity to deal with the adverse international repercussions. *See Hines v. Davidowitz*, 312 U.S. 52 (1941); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Pink*, 315 U. S. 203, 232-33 (1942).[27]

[27] As the State of Washington has elsewhere argued:

> "[A]s the [PWSA] and legislative history made clear, Congress . . . was mindful that design and construction standards had historically been an area for multinational agreement and action, that uniformity was desirable since tankers in international trade necessarily subject themselves to the jurisdiction of more than one nation, and that many of the tankers entering the navigable waters of the United States were of foreign registry and thus subject to the sovereignty of a foreign government. . . . Congress devoted substantial attention and concern to the issue of how to balance its desire to protect the marine environment with international considerations."

Legal memorandum submitted by States of Washington, Alaska and Oregon to U.S. Department of Transportation on Dec. 10, 1976, reprinted in *Hearings on Recent Tanker Accidents before the Senate Committee on Commerce*, 95th Cong., 1st Sess., Ser. No. 95-4, at 304 (1977).

4. State Regulation Will Necessarily Interfere With the Coast Guard's Balancing of Interests under the PWSA

Congressional intention to preempt is also demonstrated by provisions in both titles of the PWSA requiring the Coast Guard to balance the various competing interests affected by its regulations. Section 102(e) requires the Coast Guard to "consider fully the wide variety of interests which may be affected" in determining the need for and substance of its regulations under Title I, specifically including — in addition to environmental factors — the "minimum interference with the flow of commercial traffic" and the "economic impact and effects" of its regulations. Similarly, Section 201(4) requires Coast Guard consideration of such factors as the efficacy, cost and practicability of the vessel design requirements to be imposed under Title II. Moreover, the PWSA delegates to the Coast Guard the authority to make the difficult policy judgments which will determine the extent of the burden imposed by environmental regulations upon tanker operations. For example, Congress expressly "chose to rely on the discretion of the Secretary in determining which standards for the design, construction, maintenance and operation of tankers should be applied to tankers already in existence." Senate Report at 27.

While protection of the marine environment was undoubtedly the principal purpose behind enactment of the PWSA, the federal act — unlike the Tanker Law — requires a balancing of these environmental concerns with economic and other considerations. Senate Report at 33. The Coast Guard's decision to go only so far in its regulations under the PWSA is thus an affirmative decision that tanker regulation should appropriately go no further. More stringent state regulation of tankers necessarily disrupts the considered balance set by the Coast

Guard in its administration of the PWSA.[28] As the Court held in *Burbank*, where the Federal Aviation Act similarly required consideration of safety and efficiency in adoption of federal noise regulations, "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives . . . are to be fulfilled." 411 U.S. at 638-39. *See also Northern States Power Co. v. Minnesota*, *supra*, at 1153-54; *Exxon Corp. v. City of New York*, 548 F.2d 1088, 1093 (2d Cir. 1977).[29] Or, as Mr. Justice Holmes put it:

> "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & Western Carolina Ry. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

C. The Tanker Law's Size Limit Is Preempted

The Size Limit imposed by Section 3(1) of the Tanker Law is preempted by both titles of the PWSA. Congress authorized the Coast Guard to impose tanker size limits in PWSA Section 101(3)(iii), and the legislative history of Title I demonstrates that Congress intended to preclude state-imposed size limits. *See* pp. 19-20, *supra*.

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[28] As discussed at pp. 49-50, *infra*, Washington's Tanker Law does in fact interfere with the Coast Guard's implementation of the PWSA by attempting to exceed size and tug escort requirements the Coast Guard has imposed and to prescribe Design Requirements it has rejected.

[29] Appellants' attempted distinction of *Burbank* and *Northern States Power* on the ground that the federal agencies involved "were charged with the dual functions of both regulating and promoting an industry" (B.A. at 37) is untenable in light of the express congressional directive to the Coast Guard "to promote the safe and efficient conduct of maritime commerce" in Section 102(e) of the PWSA, and the Coast Guard's duty to consider the strong federal interest in promoting development of the U.S. merchant marine. *See, e.g.*, Merchant Marine Act of 1970, discussed at n. 24 *supra*, and pp. 55-57 *infra*.

The Size Limit is also a design requirement preempted under Title II in light of the congressional intent to establish uniform federal regulation. *See* p. 22, *supra*.

Recognizing that the national interest demands use of large tankers, Congress directed that even Coast Guard size limits "should not be imposed universally," Senate Report at 33, but only to the extent necessary upon consideration of all relevant circumstances, including the depth and width of a particular confined channel, weather conditions, and maintenance of the flow of commercial traffic with minimum interference. *Ibid.*

The Coast Guard's regulations therefore empower its local Captains of the Port to impose size limits on a case-by-case basis as conditions may require. 33 C.F.R. § 160.35. And in the Puget Sound VTS the Coast Guard has established size regulations which permit passage of tankers over 70,000 DWT but require one-way traffic during their transit of Rosario Strait, a size limitation which is reduced to 40,000 DWT in adverse weather. (A. 65)

The Coast Guard's exercise of its size limit authority in the carefully calibrated manner directed by Congress plainly preempts the Tanker Law's absolute Size Limit. Where Congress has intended to preempt the field, state regulation is invalid if "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947). The fact that the Coast Guard has not imposed an absolute size limit on tankers entering Puget Sound can lend no support to the Tanker Law's validity, particularly where, as here, "federal administration has made comprehensive regulations effectively governing the subject matter" and the "failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947). *See also City of Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77, 86-87 (1958); *Napier v. Atlantic Coast Line R.R.*, *supra*, at 613.

D. The Tanker Law's Design Requirements and Tug Escort Proviso Are Preempted

1. The Design Requirements, Standing Alone, Would Be Preempted

It is evident that the Design Requirements of the Tanker Law, standing alone, would be preempted by the PWSA. The pervasive scheme of federal regulation of tanker design, the legislative history of both Titles of the PWSA, and the urgent need for uniform national regulation compel this conclusion. The features prescribed by the State — double bottoms, twin screws, extraordinary propulsion, and two radars with collision-avoidance equipment — are precisely the kinds of design requirements which the Congress directed the Coast Guard to consider and, if appropriate, to prescribe in the exercise of its regulatory jurisdiction under the PWSA. And the Coast Guard has in fact considered and rejected, at least for the present, each of these requirements. *See* p. 51, *infra*.

2. The Tanker Law's Combination of Design Requirements and Tug Escort Proviso Is an Invalid Attempt to Regulate Tanker Design

The Tanker Law's Design Requirements do not stand alone, and they can be avoided — at a price — if a tanker employs tugboats in accordance with the Tug Escort Proviso. But this case likewise does not involve the validity of a state law which simply requires tug escorts: Section 3(2) of the Tanker Law requires a tug escort only for those tankers over 40,000 DWT which do not incorporate the state-prescribed design features.

This provision of the Tanker Law is an effort by the State to regulate, albeit indirectly, the design of tankers moving in interstate and international trade — an area forbidden to the states by the PWSA. The purpose and effect of this provision is to pressure tanker operators to incorporate the state's preferred design features, and to impose an economic penalty on them for failing to do so. Appellants concede that Section 3(2) of the Tanker Law "constitute[s] a legislative expression of what the State would like to see incorporated on tankers used in Puget Sound." Brief of Appellants at 7.[30]

The State's intent to regulate the design and equipment of tankers is manifest in the structure of Section 3(2). Its Tug Escort Proviso is inextricably tied to its Design Requirements and must fall with them if the State is precluded by the PWSA from regulating the design of tankers. See *Washington v. W. C. Dawson & Co.*, 264 U.S. 219, 223 (1924).

The PWSA gives the Coast Guard ample authority to adopt the Tanker Law's carrot-and-stick approach to regulation of tanker design. See PWSA §§ 101(3)(iii) & (iv), 201(3). Congress specifically contemplated that the Coast Guard would use its powers under Titles I and II in tandem, recognizing that some regulatory problems "might best be attacked through a combination of vessel traffic controls and design and construction standards." Senate Report at 14.

Implementing this approach, the Coast Guard's proposed tug assistance regulations will take into account

[30] As Senator Washington stated during debate on the Tanker Law:

> "I think we have all said one of the major reasons we are enacting this bill . . . is to give the industry notice that this is the policy of the State of Washington and that you should govern yourselves accordingly in the design and construction of the ships." Transcript of Debate, Washington State Senate, May 9, 1975, at 19.

such factors as the size of the vessel, its draft, its propulsion, and the availability of twin screws or bow thrusters. 41 Fed. Reg. at 18771. The Coast Guard EIS on tanker design likewise indicated that the Coast Guard will require tug assistance as an alternative to specified design features, thereby offering the prospective ship owner "incentives to incorporate those individual added design features which he feels are to his economic advantage, while at the same time allowing him flexibility in evaluating the economic trade-off of vessel design." (A. 303) The Coast Guard EIS gave as an example the possibility of requiring tug assistance before tankers lacking bow thrusters would be allowed to transit a particular navigational hazard under specified weather and current conditions. (*Ibid.*) This typifies the carefully-balanced regulation mandated by Congress. PWSA §§ 102(e), 201(4).

The combination of design requirements and tug escort provisos (or other incentives) can only be an effective regulatory tool at the federal level. In the absence of uniform national standards, the actual and prospective diversity of state-imposed design standards combined with tug escort or other alternatives makes investment in new tanker construction to comply with the prescribed design features impracticable. Alaska, for example, has already passed its own tanker law requiring use of tug escorts unless the tanker is equipped with an entirely different set of design features.[31]

[31] The Alaska design features are lateral thrusters; controllable pitch propellers or extraordinary astern horsepower; and double boilers. Alaska Stat. § 30.20.020(b) (Supp. 1976). The Alaska law further penalizes certain tankers by imposing increased "risk charges" unless the vessel is equipped with additional design features such as gas inerting systems and double hulls. *Id.* § 30.25.250. The purpose of the Alaska law, the State concedes, is to "encourage . . . higher vessel design and equipment standards than currently required by the Coast Guard." Brief of the State of California, joined by the State of Alaska, *et al.*, as Amicus Curiae, at 3 n.2.

Tanker operators thus have no economic choice but to bear the penalty cost of tug escorts required by the Tanker Law. These costs are substantial: more than $275,000 per year for Atlantic Richfield alone (A. 67-68), and, assuming the experience of Shell, Mobil, Texaco and two smaller refiners is similar, well over $1,000,000 per year for tankers in Puget Sound. With the prospect of incurring these costs annually — and the additional costs imposed by comparable laws adopted by other states such as Alaska — the burden imposed on tanker operators will be considerable.[32]

3. Even Viewed as a Simple Tug Escort Law, the Tug Escort Proviso Is Preempted

Even if viewed as a simple tug escort law, Washington's Tug Escort Proviso is preempted by the PWSA. The Coast Guard has authority to require tug escorts under PWSA §§ 101(3)(iii) & (iv), and is implementing it on a nation-wide basis through its proposed regulations to require tug assistance for vessels operating in confined waters to provide "uniform guidance for the maritime industry and Captains of the Port," 41 Fed. Reg. at 18771. In addition, existing Coast Guard regulations empower its local District Commanders and Captains of the Port to exercise tug escort authority in congested or hazardous areas or under adverse weather conditions when "necessary for safe operation under the circumstances." 33 C.F.R. § 160.35. The Puget Sound Captain of the Port has exercised this discretionary authority to require tug escorts. While the Tanker Law has as a practical matter made it pointless for him to determine when

[32] Of course, the burden imposed by the Tug Escort Proviso would exist if the State had simply enacted a tug escort law. But absent the coercive aspects of the design requirements/tug escort combination, there is no way of knowing whether Washington would enact such a law or what its contours might be — *e.g.*, whether the state might look more carefully to ascertain where and when tug escorts might serve a legitimate need.

and where tug escorts for oil tankers are "necessary," he has imposed tug escort and other operating requirements on LPG tankers and at least one other vessel not subject to the Tanker Law. See Appendix to this brief, at pp. A-3, 8, 11-12, *infra*.

The Tanker Law's tug escort requirement is inconsistent with the tug escort requirements implemented by the Captain of the Port. He has found tug escort requirements to be necessary only for selected vessels — *e.g.*, for the "Valerie F" because of its lack of maneuverability and adverse weather conditions — and only upon reaching the entrance to Rosario Strait, an explicit recognition that tug escorts are not necessary elsewhere in Puget Sound. *Ibid.* The Coast Guard has adopted an identical approach in Prince William Sound, Alaska, rejecting a mandatory tug escort requirement in Valdez Narrows because "requiring tug assistance for these vessels on every transit of Valdez Narrows is a too restrictive approach" and "would not appreciably prevent a potential grounding by a tank vessel in the Narrows under normal circumstances." 42 Fed. Reg. at 37930.[32a] The Coast Guard thus left it to the vessel traffic control center to "determine whether tug assistance is appropriate on a case by case basis taking into account all relevant factors." *Ibid. See also* PWSA § 102(e).

[32a] The Coast Guard explained:

> "Tugs are effective only when the tank vessel is proceeding at relatively slow speed, yet the tank vessel's maneuverability is less at low speeds. At higher speeds there are risks involved to both the vessel and the tugs. These risks must be weighed against the advantages of employing the tugs." *Ibid.*

The Coast Guard recently noted elsewhere that "tugs have not been without problems," citing a 300,000 gallon spill in December 1974 when an "assisting tugboat penetrated the shell of a 326,000 DWT tanker." Coast Guard Comments on Proposed Alaska Regulations, filed July 28, 1977, Encl. 4, at 4-5. *See also* A.122. A copy of these comments will be filed with the Clerk for the convenience of the Court.

In these circumstances, Washington's Tug Escort Proviso, even standing alone, is preempted. PWSA § 102(b). The fact that the Coast Guard has not yet adopted generally applicable standards of tug assistance is irrelevant to this preemption analysis in light of the Coast Guard's constant watch over vessel traffic in Puget Sound and its delegation of authority to the Captain of the Port to require tug escorts when and where necessary. See *Rice v. Santa Fe Elevator Corp., supra,* and other cases cited at pp. 30-31, *supra; Exxon Corp. v. City of New York, supra,* at 1095-96.[33]

4. The Solicitor General's Position, that the Tug Escort Proviso Can Stand Alone Until Preempted by Coast Guard Regulations, Is Untenable

The brief filed by the Solicitor General in response to the Court's invitation cogently sets forth the position of the United States as *amicus curiae* that the PWSA establishes a pervasive regulatory scheme and preempts the Tanker Law's Size Limit and Design Requirements. The Solicitor General supports appellants in one respect, however. Reversing the position of the United States in the Court below, the Solicitor General attempts to salvage a piece of the Tanker Law for the time being by arguing

[33] Appellants point to a statement made by Coast Guard Admiral Siler, in response to a question posed to him during a recent Senate hearing, that the Coast Guard would support a state law which "add[ed] on to the existing federal standard, rather than conflict with it, say to require the use of tugs to address some particular local risk." *Hearings on Recent Tanker Accidents, supra,* at 463. Admiral Siler's statement is ambiguous at best. His comments do not appear to sanction state regulation of vessel size or design, nor would they support state imposition of tug escorts as a burden on non-compliance with tanker design requirements. To the extent that his comments can be read to support an independent state tug escort law, his comments are inconsistent with the PWSA, its legislative history, and its consistent interpretation by his own agency. *See* Opinion of the Coast Guard Chief Counsel, July 10, 1975 (A. 361-62); Coast Guard Comments on Proposed Alaska Regulations, *supra,* Encl. 1, at 2-3 (expressing Coast Guard view that Alaska tug escort requirement preempted by PWSA and Prince William Sound VTS).

that its Tug Escort Proviso should be sustained until preempted by Coast Guard regulations. This position is untenable on several independent grounds:

(1) The Solicitor General proceeds from the erroneous premise that the Coast Guard has not yet taken action to require tug escorts in Puget Sound, apparently unaware of the selective tug escort requirements recently imposed by the Puget Sound Captain of the Port. The Solicitor General concedes that state tug escort requirements will be "imminently" preempted as soon as the Coast Guard has implemented its tug escort authority, Br.U.S. at 32, 35, and specifically recognizes that the Coast Guard's regulations for the Prince William Sound VTS — requiring tankers over 20,000 DWT to use tug assistance when transiting Valdez Narrows if so directed by the Coast Guard's vessel traffic control center, 42 Fed. Reg. 37928 (July 25, 1977), 33 C.F.R. § 161.378 — preempt Alaska's recently enacted tug escort scheme. Br.U.S. at 32 n.34. In view of the existence and exercise of the identical authority by the Puget Sound Captain of the Port, Washington's Tug Escort Proviso, even viewed in isolation from its Design Requirements, must likewise be preempted.

(2) There is no basis for the Solicitor General's view that the preemptive effect of Section 102(b) is limited to state vessel equipment requirements. Br.U.S. at 33-34. Section 102(b) explicitly preempts state "safety standards" as well as equipment requirements, and in terms applies to all of Title I — including its tug escort provisions (§ 101(3)(iii) and (iv)) — not just to its provision for vessel equipment requirements (§ 101(2)). Section 102(e) requires the Coast Guard in prescribing tug escort requirements to consider a broad range of relevant factors, including the need for tug escorts under various "geographic, climatic, and other conditions" as well as the desire for "mini-

mum interference with the flow of commercial traffic." Its balancing of these interests necessarily precludes state regulation even where the Captain of the Port determines not to require tug escorts.

Nor is there anything in Title I's legislative history which would limit the preemptive effect of Section 102(b) to equipment requirements. On the contrary, this provision was added to alleviate concern that "each of the coastal States [might impose] different types of regulations and requirements so that an incoming vessel would be in a state of confusion," *1970 House Hearings* at 27-28, and to "minimize the variety of requirements both foreign and domestic shipping would have to meet". *1971 House Hearings* at 348-49.

The Solicitor General agrees that Congress in Title I intended to empower the Coast Guard to control vessel traffic and establish vessel size and speed limitations to the exclusion of the states. Br.U.S. at 40. The apparent distinction drawn by the Solicitor General between these requirements and tug escorts is incomprehensible.[34]

[34] The Solicitor General proceeds on the mistaken assumption that the power to require tug escorts is one traditionally exercised by the States. Br.U.S. at 32. In contrast to state pilotage laws, however, which date back to the nation's founding and which are the only state vessel regulations expressly recognized in the PWSA, the escort use of tugboats mandated by Washington's Tanker Law is a usage unsupported by historical precedent or maritime experience. While tugboats have long been used to assist vessels in the immediate docking and undocking from port facilities (A.67), and more recently have been selectively required by the Coast Guard in confined channels, the Tanker Law requires the use of several tugs to accompany each tanker headed for Cherry Point through 45 miles of largely open water. (A. 64, 67, A.A.) Appellants concede there is good faith dispute whether this use of tugboats makes any contribution to reducing the likelihood of an oil spill in Puget Sound. (A.84) Aside from Washington's Tanker Law and the recently enacted Alaska statute, we are unaware of any other state law requiring tug escorts, and appellants have not cited any.

(3) The Solicitor General acknowledges that the Tanker Law's Tug Escort Proviso must be viewed as a "burden on non-compliance" with Design Requirements that the state has no power to prescribe, and that Section 3(2) thus "works somewhat at cross-purposes with the PWSA" in light of the congressional intent to establish uniform federal regulation of tanker design. Br.U.S. at 34-35. We can perceive no principle which would allow a state to "penalize the operators of vessels that do not comply with design and construction standards different from those established by the federal government," *id.*, where, as here, Congress has mandated exclusive and uniform federal regulation. In arguing that the Tanker Law's combination of Design Requirements and Tug Escort Proviso should be upheld unless it "works a substantial and immediate interference with the federal scheme," *id.* at 35-36, the Solicitor General has seemingly forgotten that the principal issue here is whether Congress in the PWSA intended to preempt such state regulation of vessel design, not whether the state law in fact conflicts with the federal scheme.

(4) The Solicitor General concludes that Washington's attempt to "penalize noncompliance" with the Design Requirements should be disregarded because the costs of compliance with the Tug Escort Proviso are "insubstantial". Br.U.S. at 36. Yet compliance has already cost Atlantic Richfield over $500,000, and the continuing burden of such expense — together with the prospect of comparable or greater penalties in other states — is consequential. The implicit assumption underlying the Solicitor General's view is that Atlantic Richfield has a deep pocket, hardly a neutral principle on which to base a preemption decision. It is impossible to see how such penalties for non-compliance with state design requirements can be sustained in light of the PWSA's objective of uniform federal regulation of vessel design.

E. Federal Preemption of Tanker Design and Movement Does Not Invade An Area of Traditional State Authority

There is no basis for appellants' contention that federal preemption of the Tanker Law would "radically upset an area of traditional state authority." B.A. at 24. The line drawn by the PWSA between state authority to regulate "structures" and port facilities on land and exclusive federal authority to regulate the design and operation of vessels is grounded on substantial historical precedent. [34]

Appellants' reliance on several cases which upheld state power over various local aspects of port and harbor regulation, B.A. at 26, is misplaced. None of these cases involves state regulation of vessel design or equipment, and none sustains state regulation in the face of a federal statute arguably preempting the field. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 298 (1851), was based upon a federal statute expressly authorizing state regulation of pilotage of registered vessels. See 53 U.S. at 315-21. *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881), and *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882), rely on state power to control the use of wharves and docking facilities, and support the distinction drawn by Congress in the PWSA. As the Court in *Parkersburg* stated, "wharves, levees, and landing-places . . . are attached to the land; . . . and they are primarily, at least,

[34] In addition to the long-standing and exclusive federal regulation of vessel design and equipment discussed above, control of vessel movement, navigation and navigable waters has long been a paramount federal responsibility. *See, e.g.*, Submerged Lands Act, 43 U.S.C. §§ 1311(d), 1314(a) (preserving "paramount" federal right to control navigation through territorial waters ceded to states); Rivers and Harbors Act, 33 U.S.C. §§ 401, 403 (requiring federal approval for obstruction of navigable waters); Inland Rules of the Road, 33 U.S.C. §§ 151 *et seq.* (domestic navigation rules); and International Regulations for Preventing Collisions at Sea, 33 U.S.C. §§ 1051 *et seq.* (international navigation rules).

subject to the local State laws," whereas the United States "is invested with supreme and paramount authority" over navigable waters. 107 U.S. at 700-01; see *Packet Co. v. Catlettsburg*, *supra*, at 562.

The three modern Court decisions relied on by appellants to support local regulation of tankers, B.A. at 42 n.50, in fact show that the Tanker Law exceeds the generally understood limits upon state regulation of vessels.

In *Kelly v. Washington*, *supra*, the Court merely upheld a Washington law providing for inspection of vessels *not* subject to federal inspection. *See* 302 U.S. at 4-5, 13-14. At the same time, the Court struck down the design and equipment requirements of the Washington law because of the need for uniform national standards. *Id.* at 14-15.

In *Huron Portland Cement Co. v. City of Detroit*, *supra*, the Court upheld the application of a Detroit smoke abatement ordinance to vessels on the ground that the preemptive scope of the federal vessel inspection laws was at that time limited to vessel safety and did not encompass air pollution control. With the PWSA's expansion of the purposes of federal tanker regulation to encompass protection of the marine environment, the holding of *Huron* supports the preemption holding of the court below. J.S. at 10a-11a.[35] *See also*, *Lockheed Air Terminal v. City of Burbank*, 457 F.2d 667, 672-73 (9th Cir. 1972), *aff'd*, 411 U.S. 624 (1973). Moreover, the Detroit ordinance was "not . . . a direct regulation of commerce." 362 U.S. at 447. It applied to all emission sources within the City, not solely to vessels in

[35] Since both the PWSA and the Tanker Law are intended to protect the marine environment against the danger of oil spills, this case does not present any question whether state-imposed requirements to control air pollution from tankers would be preempted by federal law.

interstate or foreign trade, and it did not by its terms regulate vessel design and equipment.

Askew v. American Waterways Operators, 411 U.S. 325 (1973), upheld the validity of a Florida law imposing strict liability for oil pollution damage. As the three-judge court noted, however, the Florida statute "did not attempt to regulate the design of the tanker or tanker operations." J.S. at 10a.[36] The preemption issue in *Askew* involved the Federal Water Pollution Control Act which, in contrast to the PWSA, expressly disclaims any intent to preempt the states from imposing liability for oil spills. 33 U.S.C. § 1321(o)(2).[37]

F. Other Federal Statutes Do Not Support State Regulaton of Tanker Design and Operation

Appellants seek to sidestep the preemptive intent of the PWSA by arguing that Congress in other federal statutes — particularly the Federal Water Pollution Control Act ("FWPCA"), Coastal Zone Management Act ("CZMA"), and Deepwater Port Act ("DWPA") — has allowed the states a role in other aspects of water pollution control or port regulation. However, there is no basis for reading these statutes to establish a general federal policy of "cooperative federalism" which would authorize the Washington Tanker Law. None of these statutes relates to tanker design or navigation or purports to authorize state regulation of those subjects. On the contrary, as the court below recognized, the very fact that these statutes explicitly invite state participation highlights the absence of any comparable intent by Congress in enacting the PWSA. (J.S. at 9a.)

[36] The Court expressly reserved decision on the validity of one provision of the Florida law authorizing a state agency to require vessels to carry "containment gear" for oil spill clean-up. 411 U.S. at 336-37.

[37] Washington law elsewhere imposes strict liability for damages caused by oil spills. R.C.W. § 90.48.320.

The Federal Water Pollution Control Act deals with oil spill liability and cleanup, and it is only in this field that its nonpreemptive provision allows state regulation. The legislative history of the PWSA emphasized the distinction between the FWPCA's regulation of liability and clean-up, and the PWSA's regulation of tanker design and movement to prevent oil pollution. *Hearings on Port and Waterways Safety — Part 2, Before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 92d Cong., 2d Sess., at 192-94 (1972); Senate Report at 9. The FWPCA does not diminish the Coast Guard's exclusive authority to regulate tanker design and navigation under the PWSA. *See* FWPCA § 511(a), 33 U.S.C. § 1371(a); *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976).[38]

It is equally clear that the Coastal Zone Management Act does not authorize state regulation of vessel design or navigation. While the Act "encourage[s] the states to exercise their full authority" in the coastal zone, CZMA § 302(h), 16 U.S.C. § 1451(h), nothing in the Act purports to give the states any authority they did not already have or allows the states to interfere with the Coast Guard's exclusive regulation of tanker design and movement under the PWSA. *See* CZMA § 307(e), 16 U.S.C. § 1456(e).

[38] Where the FWPCA does touch on vessel design and navigation, it affirmatively indicates an intention to preclude state regulation. Thus, the dredging activities of the Army Corps of Engineers are not subject to state permit requirements under the FWPCA because "the overriding concern of the Congress in this context was for the maintenance of unimpeded traffic in the navigable waters of the United States." *Minnesota v. Hoffman*, 543 F.2d 1198, 1209 (8th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3706 (Apr. 25, 1977). *See also EPA v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976). In one section dealing with vessel equipment requirements, Section 312(f)(1), 33 U.S.C. 1322(f)(1), the FWPCA expressly preempts state regulation of marine sanitation devices because of the "urgent need for uniformity." H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 136 (1972).

Nor is the approval of the Washington Coastal Zone Management Program by the National Oceanic and Atmospheric Administration ("NOAA") relevant to this appeal. The Tanker Law is not a part of the State's Program. It is mentioned only once in passing in the 300-page Program document (Pre-Trial Order Ex. AAA, p. 18), and that one brief reference noted that the Tanker Law was being challenged as unconstitutional. The Program does not identify the Tanker Law as one of the means to be employed to control land and water uses in the coastal zone, as required by 16 U.S.C. § 1454(b)(4). And the NOAA Administrator who approved the State Program has expressly disclaimed any intention of approving the Tanker Law as part of the Program. (A. 358) As the United States informed the court below, "the Coastal Zone Management Act and the State of Washington's plan thereunder have nothing to do with the field of tank vessel regulation." Reply Brief of the United State as Amicus Curiae at 3.

The Deepwater Port Act of 1974 likewise does not authorize state regulation of tanker design or navigation. Appellants simply misread the DWPA in contending that it gives the states "final authority over supertanker use off their coasts." (B.A. at 53) The DWPA does not authorize state regulation of the size, design or navigation of the tankers using a deepwater port facility. On the contrary, Section 10 of the Act, 33 U.S.C. § 1509, directs the Secretary of Transportation to establish federal regulations governing the movement, equipment and operation of such tankers.

Section 9 of the DWPA, 33 U.S.C. § 1508, does require the approval of the governor of an "adjacent coastal state" before *construction* of a deepwater port, but this veto power is merely a seaward extension of the states' existing "regulatory control over construction of onshore port-related facilities." S. Rep. No. 93-1217, 93d

Cong., 2d Sess. (1974), (hereinafter DWPA Senate Report), at 11.[39] The states' veto power over deepwater port construction was adopted to afford coastal states the opportunity to protect themselves from the economic and environmental impacts of land-based "petroleum related industrialization" and "secondary development" generated by a deepwater port. DWPA Senate Report at 10. *See also* H.R. Rep. No. 93-668, 93d Cong., 1st Sess. 3-4 (1973); H.R. Rep. No. 93-692, 93d Cong., 1st Sess. 17-18 (1973); Opinion of the Secretary of Transportation Approving Application of Seadock, Inc., Dec. 17, 1976, at 32-34 (denying Florida adjacent coastal state designation on ground, *inter alia*, that consideration of environmental impact of increased large tanker traffic "went well beyond the requirements of the Act").[40]

Indeed, the basic purpose of the DWPA was to enable the United States "to benefit from the economic and environmental advantages" of large tankers. DWPA Senate Report at 7; *see also* H.R. Rep. No. 93-668, *supra*, at 1-2. And Congress recognized that these benefits are in some instances equally attainable in existing port areas. 33 U.S.C. § 1503(d).[41]

[39] A deepwater port is defined in the Act as "any fixed or floating manmade structures other than a vessel . . . ." 33 U.S.C. § 1502(10). Compare PWSA § 102(b).

[40] Contrary to appellants' claim (B.A. at 53 n.63), state power to regulate the design, equipment or operation of tankers has not been recognized in implementation of the DWPA. In settlement of Florida's legal action challenging the Secretary's denial of adjacent coastal state status, he merely agreed to consider Florida's design and operation proposals in the promulgation of *federal* regulations under the DWPA. Stipulation of Settlement and Voluntary Dismissal, *Askew v. Coleman*, No. 76-2005 (D.D.C., Jan. 25, 1977).

[41] Appellants also rely (B.A. at 37) on Section 7(d) of the Dangerous Cargo Act, 46 U.S.C. § 170(7)(d), which provides that the Act does not preempt reasonable local regulations relating to the carriage and handling of explosives and other dangerous substances. But this statute does not apply to tankers, *see* 46 U.S.C. § 170(1), and is too remotely related to the PWSA to be

G. Regulation of Tanker Design and Navigation Belongs Exclusively in the Federal Forum

Atlantic Richfield supported passage of the PWSA in the belief that comprehensive federal standards for the construction and operation of tankers and control of vessel traffic were "urgently needed to strengthen existing laws which are designed to protect the environment." *Senate Hearings* at 237. It shares appellants' concern that rigorous tanker safety standards be enforced to protect the nation's waters. But, as the United States framed the issue in this case in the court below:

> "[T]he question is not whether the design and operation of oil tankers should be regulated and controlled in the interests of the marine environment, for it is common ground that such regulation is required. The question in this case is whether that control is to be exercised and the scope of the regulations determined by the federal government in the manner which Congress has prescribed, or whether those determinations are to be made by the inconsistent and diverse action of the several states." Brief of the United States as Amicus Curiae at 9-10.

The risk of such "inconsistent and diverse action" is real. As noted above, the State of Alaska has already enacted legislation which requires payment of substantial "risk charges" as well as use of tug escorts unless tankers meet design requirements entirely different from those required by the Washington Tanker Law. More-

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of any significance in determining the PWSA's legislative intent; it is not so much as mentioned in the text of either committee report. Section 7(d) was enacted primarily to assure local port authorities that they could continue to regulate the use of docking facilities to protect them from explosions, and not to allow state regulation of the design or operation of the vessels themselves. *See Hearings on H.R. 7357 before the House Committee on Merchant Marine and Fisheries*, 76th Cong., 3d Sess. (1940), at 29-35, 42-46, 90.

over, the Alaska risk charge scheme, recognizing the environmental advantages of larger tankers, encourages use of the tankers over 125,000 DWT prohibited by Washington and penalizes use of smaller tankers.[42]. California, Oregon, Maine, and other states are waiting in the wings. Brief of California *et al.* as Amicus Curiae, at 3 n.2; Oregon Senate Bill 577, 1977 Regular Session; Brief of Maryland, *et al.*, as Amicus Curiae, at 13; *see generally* Pre-Trial Order ¶ 153. The probability of proliferating state regulation of the size, design and navigation of tankers underscores the need for national uniformity. *See City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 627-28, 639 (1973); *Kelly v. Washington*, 302 U.S. 1, 14-15 (1937); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945). As this Court recently held, "[s]uch proliferation . . . would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent." *Douglas v. Seacoast Products*, 45 U.S.L.W. 4488, 4493 (May 23, 1977), slip op. at 21.

Congress recognized this need for uniform federal regulation in enacting the PWSA. If more stringent regulation of tankers is required, it must take place at the federal level. Federal regulatory activity in this area is active and ongoing. The Coast Guard under the

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[42] Proposed regulations to implement the Alaska law indicate that calculation of risk charges will be based on a "vessel pollution coefficient" assigned to each tanker. The vessel pollution coefficient will be determined by the design features of the tanker, adjusted by a "traffic ratio" equal to 40,000 DWT divided by the deadweight tonnage of the tanker. As a result, a 75,000 DWT tanker will be assessed twice the "risk charge" of a similarly equipped 150,000 DWT tanker. In addition, the total annual burden is dependent upon the number of port calls each vessel makes, which will be lower if larger vessels are used. *See* proposed 18 Alaska Admin. Code § 20.050, Notice of Proposed Changes in the Regulations of the Alaska Department of Environmental Conservation, dated June 10, 1977. A copy of these proposed regulations is being lodged with the Clerk for the convenience of the Court.

Carter Administration has adopted or proposed a host of new regulations touching virtually every aspect of tanker design and movement.[43] Congress is also considering action to amend the PWSA, and on May 26, 1977, the Senate passed S.682, which would mandate Coast Guard adoption of specified design and equipment requirements, including double bottoms for new vessels and a second radar with collision-avoidance capability. 123 Cong. Rec. S.8748-53 (daily ed.); *see* S. Rep. No. 95-176, 95th Cong., 1st Sess. (1977).

The Constitution, the PWSA and common sense require that tanker regulation remain exclusively in this national forum.

II. THE TANKER LAW CONFLICTS WITH THE PWSA AND ITS IMPLEMENTATION, WITH THE FEDERAL VESSEL REGISTRATION, ENROLLMENT AND LICENSING LAWS, AND WITH FEDERAL POLICY PROMOTING CONSTRUCTION AND USE OF LARGE TANKERS

The decision of the court below can be affirmed on several alternative grounds which were raised but not decided in the three-judge court.

Even if not preempted by the PWSA, the Tanker Law is invalid under the Supremacy Clause if it conflicts with the PWSA or other federal legislation or the administration of a federal program. *Jones v. Rath Packing Co., supra,* at 4325, 4328-29; *De Canas v. Bica,* 424 U.S. 351, 363-65 (1976). While appellants argue that there is

[43] Appellant environmental groups had previously filed suit against the Coast Guard alleging that its regulations did not comply with its statutory mandate under the PWSA. *Natural Resources Defense Council v. Coleman,* No. 76-0181 (D.D.C., filed Feb. 2, 1976). That action has been stayed by stipulation filed April 21, 1977, pending the outcome of the current rulemaking proposals.

no conflict because it is physically possible at present to comply with both federal and state laws, this is not the test. Rather, the Tanker Law is invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co., supra, at* 4325; *Perez v. Campbell,* 402 U.S. 637, 649 (1971). See also *Nash v. Florida Industrial Comm'n,* 389 U.S. 235, 240 (1967); *Sears Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 229 (1964).

A. The Tanker Law Conflicts with the PWSA and Its Implementation by the Coast Guard

The Tanker Law's Size Limit conflicts with Section 101(3)(iii) of the PWSA and Coast Guard regulations. Congress in enacting this Section considered the desirability of absolute size limits on tankers entering U.S. ports at the urging of appellant Sierra Club, *1971 House Hearings* at 379; *Senate Hearings* at 77-78, 84-86, and rejected such a sweeping prohibition on the ground that it would require "more tankers" to meet "the requirements for oil in the Nation." *Id.* at 79-80 (Statement of Sen. Inouye). *See also 1971 House Hearings* at 30, 32. The Coast Guard's regulations and the Puget Sound VTS are true to the congressional intent that size limitations "not be imposed universally" but only to the extent necessary after careful weighing of all relevant factors. Senate Report at 33. The Tanker Law Size Limit, absolutely barring tankers over 125,000 DWT from all of Puget Sound, is inconsistent with these regulations and the underlying congressional intent. *See Lockheed Air Terminal v. City of Burbank, supra,* 457 F.2d at 676 (conflict with federal agency's balancing of interests).

Section 3(2) of the Tanker Law is invalid in its effort to coerce adoption of Design Requirements considered and rejected by the Coast Guard. The Design Requirements in effect nullify these Coast Guard decisions.

While the Coast Guard is presently reconsidering its initial rejection of double bottoms and collision-avoidance radars,[44] it has shown no indication of any intention to reconsider its rejection of the extraordinary horsepower and twin screws also required by the Tanker Law. The Coast Guard rejected the horsepower requirement because it would not effectively decrease stopping distance and because it "has not been able to document one case where inadequate stopping of a large tanker was a major contributing cause in a marine accident." (A. 296-97). The Coast Guard found that twin screws would produce only a marginal improvement in the slow-speed turning ability of a tanker. (A. 288, 298-99) The "primary reason" for rejecting both requirements was "the absence of any evidence that the improvements in maneuvering and stopping ability which these features and equipment would provide for large tankers would materially reduce the possibility of collisions, grounding, or other accident." (A. 288)

The Tug Escort Proviso of the Tanker Law also conflicts with federal implementation of the PWSA, for the reasons set forth at p. 35 *supra*.

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[44] *See* p. 17 *supra*. The Coast Guard rejected double bottoms because of the desirability of accepting uniform international standards contained in the 1973 IMCO Convention (A. 214-21, A. 286-87), and because of its view that side-damaging accidents – for which "double bottoms would be ineffective" – may be a more substantial problem than bottom-damaging accidents, especially in port areas like Puget Sound where the water is deep. A. 287, 305-10; 40 Fed. Reg. at 48289; 41 Fed. Reg. at 1480-81. *See also Hearings on S. 333 Before the National Ocean Policy Study of the Senate Committee on Commerce*, 94th Cong., 1st Sess., Ser. No. 94-7, at 26 (1975). Coast Guard regulations therefore permit a variety of distributions of segregated ballast space. *See* 40 Fed. Reg. at 48289; 41 Fed. Reg. at 1482.

The Coast Guard rejected collision avoidance radar because the technology is "still in the developmental stage." Notice of Proposed Rulemaking, 41 Fed. Reg. 18765, 18766-67 (May 6, 1976).

B. The Tanker Law Conflicts with the Certification and Permit Provisions of the Tank Vessel Act as Amended by the PWSA

The Tanker Law also conflicts with the certification and permit provisions of the Tank Vessel Act, as amended by the PWSA. All U.S. flag tankers must obtain a certificate of inspection under the Tank Vessel Act as amended by the PWSA, issued only if the Coast Guard "approves the vessel and her equipment throughout." 46 U.S.C. § 399. All foreign flag tankers must carry an equivalent certificate of inspection from their flag nation under SOLAS. Under Section 6 of the amended Act, all tankers must also obtain a certificate of compliance with Coast Guard environmental regulations. And, most important, under Section 5 of the amended Act, all U.S. flag tankers must obtain a permit which constitutes an express grant of authority to engage in the transportation of particular kinds or grades of oil. This permit is construed by the Coast Guard as a "permit for such vessel to operate." 46 C.F.R. § 31.05-1(b).

No state may prohibit the exercise of a right granted by federal law, *see, e.g., Sperry v. Florida*, 373 U.S. 379, 385 (1963), particularly where the state seeks to exclude a carrier engaged in interstate transportation under federal authority. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Toye Bros. Yellow Cab Co. v. Irby*, 437 F.2d 806 (5th Cir. 1971). The federal permits, approvals and certificates held by tankers under the amended Tank Vessel Act are an express grant of federal rights to engage in oil transportation. The Tanker Law's ban excluding tankers over 125,000 DWT from Washington waters effectively revokes these rights and thus impermissibly conflicts with federal law. The penalty imposed by Section 3(2) on smaller tankers for noncompliance with the Design Requirements substantially interferes with the exercise of these rights.

C. The Tanker Law's Size Limit Conflicts with the Federal Vessel Registration, Enrollment and Licensing Laws

The Tanker Law's exclusion of tankers over 125,000 DWT from Washington waters is invalid as applied to U.S. flag vessels because it conflicts with the federal vessel registration, enrollment and licensing laws as they have been consistently interpreted for over 150 years. All tankers engaged in domestic trade — including the 150,000 DWT tankers under construction for Atlantic Richfield and all other tankers to be employed in the Alaska trade — must be enrolled and obtain a license in the form prescribed by 46 U.S.C. § 263, and are thereby "entitled to the privileges of vessels employed in the coasting trade." 46 U.S.C. § 251.

It has been established since *Gibbons v. Ogden, supra*, that these laws convey an affirmative right to engage in the coastwise trade, and that a state cannot completely exclude an enrolled and licensed vessel from its waters. *See* 22 U.S. at 211-22. This Court only recently reaffirmed this holding. In *Douglas v. Seacoast Products, supra*, the Court "emphatically reject[ed]" the contention of appellants here that the federal licenses are merely a registration device, holding instead that they are "a grant of the right to navigate in state waters." 45 U.S.L.W. at 4492, slip op. at 14-15. Indeed, the Court held that the federal license grants "all the right which Congress has the power to convey." *Ibid.*

Concededly, "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." *Huron Portland Cement Co. v. City of Detroit, supra*, at 447. As the Court in *Seacoast Products* stated after reviewing the cases, "States may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power." 45 U.S.L.W. at 4491, slip op. at 11.

But the Tanker Law's Size Limit absolutely excludes all tankers over 125,000 DWT, not because of their failure to comply with reasonable, non-discriminatory state environmental laws, but because of the immutable characteristics of the vessel itself. In this respect, the Tanker Law abridges the rights granted by Congress, which entitle federally-licensed tankers over 125,000 DWT to enter Washington waters on equal terms with smaller tankers.[45]

No case sustains state power absolutely to exclude federally licensed vessels on the basis of the characteristics of the vessel itself. On the contrary, the Court in *Huron* reiterated the "well delineated" understanding that "[a] state may not exclude from its waters a ship operating under a federal license." 362 U.S. at 447. In upholding application of a Detroit air pollution ordinance to federally licensed vessels, the Court in *Huron* was careful to point out that "the ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage." *Id.* at 448. The Tanker Law's Size Limit does both.[46]

Appellants argue, however, that the state has power to exclude tankers over 125,000 DWT, notwithstanding

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[45] The Tanker Law's Design Requirements and Tug Escort Proviso may well be invalid under the *Seacoast Products* test because of their exclusive and thus discriminatory impact on vessels engaged in interstate and foreign transportation of oil. (A. 57)

[46] While all of the decided cases involve licensed and enrolled vessels engaged in coastwise trade, the same principles apply to registered vessels engaged in foreign trade. Registered vessels are "deemed vessels of the United States and entitled to the rights and privileges [thereof]." 46 U.S.C. § 221. This language is virtually identical to the language of 46 U.S.C. § 251 relied upon by Chief Justice Marshall in *Gibbons*, 22 U.S. at 212-13, and by the Court in *Seacoast Products*, 45 U.S.L.W. at 4492, slip op. at 15.

their federal licenses, because they are hazardous and unsafe — indeed, akin to diseased animals. (B.A. at 68) They rely on *Kelly v. Washington, supra,* where the Court suggested that a state could exclude a vessel if it were "actually unsafe and unseaworthy in the primary and commonly understood sense." 302 U.S. at 15. But Washington's arbitrary exclusion of all tankers over 125,000 DWT as "unsafe" flies in the face of the prima facie safety and seaworthiness of these vessels implicit in federal inspection and certification under the Tank Vessel Act. There is not the slightest evidence in the record that such tankers are unsafe or unseaworthy in the commonly understood sense, or that the State has made any such determination. On the contrary, appellants have conceded that there is good faith dispute whether use of such tankers poses any greater environmental risk than use of smaller tankers. (A. 84)

Appellants also contend that the Size Limit should be sustained because it excludes tankers over 125,000 DWT, not from all the State's waters, but "only" from Puget Sound. This contention is both legally irrelevant and factually misleading. The Tanker Law excludes such tankers from a major international waterway, containing all of the State's refineries, oil docking and terminal facilities, and major ports. (A. 47-48, 73, 75). While appellants point out there are other areas which are "reasonably developable as port sites" where such tankers "might be accommodated" (B.A. at 67 n.74), the fact is that there are no such facilities in existence outside Puget Sound (A. 75), and a pending proposal to construct such a facility at Port Angeles is, at best, a distant dream. (A. 51-52)

D. The Tanker Law's Size Limit Conflicts With Federal Policy Supporting Construction and Use of Tankers Over 125,000 DWT

The Tanker Law's Size Limit conflicts with federal policy supporting the construction and use of large tankers over 125,000 DWT, as particularly expressed in the Merchant Marine Act of 1970 and the Tanker Construction Program established thereunder by the Maritime Administration ("MarAd"). The purpose of the Merchant Marine Act is to promote development of an American merchant marine capable of carrying "a substantial portion of the waterborne export and import foreign commerce of the United States." 46 U.S.C. § 1101. The 1970 revision extended the Act's construction differential subsidy program to oil tankers for the first time, S. Rep. No. 91-1080, 91st Cong., 2d Sess. (1970), at 19, 64; H.R. Rep. No. 91-1073, 91st Cong., 2d Sess., at 23 (1970), with the goal of "creation of a more efficient U.S. merchant fleet composed of modern highly productive ships." S. Rep. No. 91-1080, *supra,* at 20. See also, *id.* at 12-17; H.R. Rep. No. 91-1073, *supra,* at 38. The Act imposes on MarAd the duty to develop an "adequate and well-balanced" United States merchant fleet and specifically to determine the "size . . . of the vessels . . . which should be employed" in carrying necessary U.S. oil imports. 46 U.S.C. §§ 1120, 1121.

MarAd's Tanker Construction Program is intended to promote the subsidized private construction of a balanced fleet of tankers of various sizes, including Very Large Crude Carriers ("VLCC's") of roughly 250,000 DWT; Jumbo VLCC's of about 400,000 DWT, and ore/bulk/oil carriers of 80,000 to 165,000 DWT. See Final Environmental Impact Statement, Maritime Administration Tanker Construction Program, N.T.I.S. Rep. No. EIS-730-725-F (May 30, 1973) (hereinafter "MarAd EIS"), at a, II-20 to 11-36. MarAd has rejected the suggestion of appellant Environmental

Defense Fund that it should stop subsidizing these larger tankers. Citing the "major transportation cost savings" of large tankers, the prevalence of such tankers in the world fleet, and the environmental advantages of reduced congestion, MarAd concluded that "large-size tankers serving a wide range of ports will be necessary for the efficient, economic transport of U.S. oil imports." *In re Environmental Review of the Maritime Administration Tanker Construction Program*, Docket No. A-75, at 20 (Maritime Subsidy Board, Aug. 30, 1973). *See also id.* at 6; MarAd EIS at II-7, IV-159, VI-34, VI-37.[47].

Appellants' suggestion that the Merchant Marine Act and MarAd Tanker Construction Program were only intended to develop a large tanker fleet to serve off-shore deepwater ports is without merit. The Merchant Marine Act pre-dated the Deepwater Port Act by more than four years. While it was contemplated that large tankers would use such deepwater ports, if any is ever constructed, MarAd also anticipated that existing deepwater harbors would be utilized. MarAd EIS at IV-63 to IV-70, IV-170. Indeed, MarAd specifically recognized that "Puget Sound is likely to be used by deep draft vessels built under the MarAd Tanker Construction Program, particularly by tankers exceeding 100,000 DWT." *Id.* at IV-94.[48]

MarAd has in fact committed substantial federal resources to the support of tankers over 125,000 DWT.

[47] The Senate Commerce Committee, chaired by Senator Magnuson, has declared: "Construction of more VLCC's is vital to our national security since these are the vessels that can transport the largest quantity of oil over the longest distances at the cheapest prices." S. Rep. No. 93-1031, 93d Cong., 2d Sess. 7 (1974).

[48] MarAd has also sought to develop large shallow draft tankers to be used in shallower existing ports. See Docket No. A-75, *supra*, at 21-22; MarAd EIS at VI-75 to VI-76.

Nearly $200 million has already been spent and an additional $224 million committed to subsidize construction of tankers of this size. (A. 59-69). Washington's exclusion of such tankers from one of the few American port areas that can accommodate them jeopardizes the success of the federal program and frustrates the accomplishment of the objectives of Congress.

III. THE TANKER LAW IS INVALID UNDER THE COMMERCE CLAUSE BECAUSE IT WILL SUBSTANTIALLY IMPEDE THE EFFICIENT FLOW OF COMMERCE IN AN AREA DEMANDING UNIFORM REGULATION

Even in the absence of preemptive or conflicting congressional action, the Tanker Law's regulation of tankers in interstate and foreign trade is invalid under the Commerce Clause. Const. Art. I, § 8, cl. 3. Protection of the channels of interstate transportation is central to the meaning of the Commerce Clause, for "[t]ransportation is essential to commerce." *Railroad Co. v. Husen*, 95 U.S. 465, 470 (1877). The Commerce Clause precludes state laws which substantially impede the free and efficient flow of interstate and foreign commerce or which attempt to regulate in an area demanding a uniform national rule. *Southern Pacific Co. v. Arizona, supra*, at 767; *Cooley v. Board of Wardens, supra*, at 319; *California v. Zook*, 336 U.S. 725, 728 (1949).

There can be little doubt at this late date that regulation of the size, design and equipment of tankers in interstate and international trade is an area imperatively demanding uniform national rule. The Court in *Southern Pacific Co. v. Arizona, supra*, in striking down analogous state regulation of the size of freight trains, held that "if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the

operation of an efficient and economical national railway system." 325 U.S. at 771. *See also id.* at 775. The Court in *Kelly v. Washington, supra,* specifically held that state-imposed vessel design and equipment requirements were invalid because of the need for national uniformity:

> "The state law . . . has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. . . ."
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> ". . . If . . . the State . . . attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule." 302 U.S. at 14-15.

See also *Bibb v. Navajo Freight Lines,* 359 U.S. 520, 526-27 (1959); *Morgan v. Virginia,* 328 U.S. 373, 386 (1946).

The business of oil transportation, certainly no less than commercial fishing, "must be conducted by peripatetic entrepreneurs moving . . . without regard for state boundary lines." *Douglas v. Seacoast Products, supra,* at 4493, slip op. at 20. It would be intolerable if every port involved in the oil transportation system were empowered to impose its own independent criteria for the size, design or equipment of tankers. The practical and efficient conduct of tanker operations requires the flexible

use of tankers and the ability to call at any port, so as to permit last minute changes in destination to meet changing refinery needs and to allow vessel cargo exchanges to alleviate spot shortages and effect transportation efficiencies. (A. 62-63) Compare *Bibb v. Navajo Freight Lines, supra,* at 527-28.[49] State-imposed size, design and equipment standards would disrupt tanker operations far beyond the state's boundaries. Compare *Southern Pacific Co. v. Arizona, supra,* at 775. If one state can impose regulations for the size, design and equipment of tankers, so can every other, and the resulting patchwork of state regulation would substantially disrupt the operation of this complex oil transportation system. *Ibid.; Kelly v. Washington, supra,* at 14-15; *Morgan v. Virginia, supra,* at 381-82; *H.P. Hood & Sons v. DuMond,* 336 U.S. 525, 538-39 (1949).[50]

The need for uniform federal regulation of tanker size, design and equipment is particularly critical because of the substantial impact of such regulation on foreign commerce and the foreign vessels carrying 94% of U.S. oil imports. (A. 58). As the Court held in *Henderson v. Mayor of New York,* 92 U.S. 259, 273 (1876): "A regulation which imposes onerous . . . conditions on those engaged in active commerce with foreign nations must of

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[49] The Coast Guard has determined that the same requirements shall be applied to vessels in domestic trade as are applied to vessels in foreign trade, based on its conclusion that "pollution regulations for all U.S. seagoing tank ships should be uniform, irrespective of the trade in which they are engaged," in large part because of "the need to allow owners the flexibility to use vessels in either trade." 40 Fed. Reg. at 48280.

[50] It is hard to see what comfort appellants draw from *Clyde Mallory Lines v. Alabama,* 296 U.S. 261, 267 (1935), or other cases sustaining local port regulations against commerce clause attack. None of these cases sustains state regulation of the size, design and equipment of the vessels themselves. And even as to local port regulations, the Court in *Clyde Mallory Lines* held such regulations valid only if they do not "impede the free flow of commerce" – as the Tanker Law surely does – and if Congress has not regulated in the area – as it has here.

necessity be national in its character." See also *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326, 336 (1887).[51]

The Tanker Law's Size Limit is invalid in light of these principles. The Tanker Law absolutely bars tankers over 125,000 DWT from Washington waters, regardless of the amount of oil they may actually be carrying; and tankers, unlike the trains at issue in *Southern Pacific*, cannot be broken up and reconstructed at the state's borders. State laws which attempt to close the state's doors to interstate commerce – not to mention foreign commerce – are particularly disfavored under the Commerce Clause. *Buck v. Kuykendall*, 267 U.S. 307, 316 (1925); *Railroad Co. v. Husen, supra*, at 469-70, 472-73. *See also Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186 (1950).

Moreover, the Size Limit will substantially interfere with the national interest in efficient and low-cost transportation of essential oil imports. *See* 49 U.S.C. § 1651(a); *Southern Pacific Co. v. Arizona, supra*, at 783-84. The Tanker Law deprives Atlantic Richfield and the consuming public, in Oregon and other states as well as Washington, (A. 48-49) of the substantial savings in

[51] The principal impact of the Tanker Law, for the past two years and at the present time, has been on the tankers in foreign trade which substantially serve Atlantic Richfield and other refiners in Puget Sound. (A. 45, 57, 107-13) While Atlantic Richfield plans to supply its Cherry Point refinery with North Slope crude oil to the extent possible, for obvious reasons it cannot, in light of possible interruptions in the flow of North Slope oil, afford to be dependent on Alaskan crude as its sole source of supply. (*See also* A. 62-63) The availability of North Slope crude oil will not, in any event, affect the continuing dependence of the other Puget Sound refiners on foreign crude oil imports. *See* Federal Energy Administration, Equitable Sharing of North Slope Crude Oil, A Study Requested by Congress in Section 18 of the Alaska Natural Gas Transportation Act, at 12, 33, 70 (April 1977). Nor would this development affect the continuing exclusion of Seatrain's foreign flag tankers from Puget Sound. (A. 53)

economy and efficiency entailed by use of tankers over 125,000 DWT – 10% to 25% in the Alaska trade and up to 50% on longer foreign runs. (A. 63-64) It also seriously devalues the investments of hundreds of millions of dollars by Atlantic Richfield as well as Seatrain in tankers which exceed the Size Limit. (A. 53-55). In contrast, the State has conceded that there is good faith dispute whether use of tankers over 125,000 DWT poses any greater environmental risk than use of a larger number of smaller tankers. (A. 84) Alaska, in fact, has concluded that larger tankers pose the lesser risk. *See* n. 42 *supra*.[53]

The Tanker Law's Design Requirements and Tug Escort Proviso are equally invalid under the Commerce Clause. Washington's attempt to regulate indirectly the design and equipment of tankers – including substantial numbers of foreign tankers – by penalizing those which do not have the state-prescribed features likewise intrudes into an area when uniform national regulation is essential. The diversity of state design standards, if permitted, will force tanker operators to bear the expense of the tug escorts required by Washington, the tug escorts and risk charges imposed by Alaska, and similar charges yet to be imposed by other states, because they plainly cannot have separately designed fleets for every port.

[53] *South Carolina State Highway Dept. v. Barnwell Brothers*, 303 U.S. 177 (1938), does not support the validity of the Size Limit. In upholding state regulation of the weight and width of trucks, the Court relied upon its view that state regulation of the use of the state's highways was of local concern, particularly since the highways were built, owned and maintained by the state. *See* 303 U.S. at 187. The Court in *Barnwell* also based its decision on application of a "rational basis" test which has been discredited in subsequent Commerce Clause cases, *e.g.*, *Bibb v. Navajo Freight Lines, supra*, at 529. As the Court stated in *Southern Pacific Co. v. Arizona, supra*, the national interest in the free flow of commerce "is not to be avoided by simply invoking the convenient apologetics of the police power." 325 U.S. at 780.

IV. THE TANKER LAW INTERFERES WITH EXCLUSIVE FEDERAL CONTROL OF FOREIGN AFFAIRS AND TREATY-MAKING

The Tanker Law is invalid because it materially interferes with federal power to make treaties, Const. Art. II, § 2, cl. 2, and the implicit federal power to conduct foreign affairs, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-19 (1936). Federal control over foreign affairs is exclusive and is not subject to interference by state laws which might frustrate foreign policy or create difficulties with foreign governments for which the nation as a whole would be held to answer. *United States v. Belmont*, 301 U.S. 324, 331 (1937); *United States v. Pink*, 315 U.S. 203, 232-33 (1942); *Hines v. Davidowitz*, 312 U.S. 52, 63-68 (1941). Even in the absence of any applicable treaty, state laws which have a direct and potentially adverse impact on foreign relations or may impair the effective exercise of the nation's foreign policy are invalid. *Zschernig v. Miller*, 389 U.S. 429 (1968). *See also, Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).[54]

The United States has recognized the desirability of international solutions to oil spill prevention and has actively committed itself to efforts to reach international agreement on regulation of tanker design. *See* p. 25-27 *supra; see generally* A. 92-94.

It is true, as appellants point out, that the 1973 Marine Pollution Convention adopted by the IMCO Conference does not in terms restrict the right of the United States

[54] Appellants mistakenly rely on *Alaska v. Bundrant*, 546 P.2d 530 (Alaska), *appeal dismissed for want of jurisdiction*, 429 U.S. 806 (1976), for the proposition that state environmental regulations are constitutional despite their effect on foreign affairs. The court in *Bundrant* upheld state regulation of crabbing beyond the state's three-mile territorial limit only because the state stipulated that the regulations "will not be enforced against foreign nationals." 546 P.2d at 540.

to impose more stringent tanker design requirements. This controversial issue was left for resolution at the ongoing Law of the Sea negotiations. *See Hearings on the 1973 IMCO Conference on Marine Pollution before the Senate Committee on Commerce*, 93d Cong., 1st Sess., Ser. No. 93-52, at 6-12 (1973). But it is simply erroneous to assume, as appellants do, that unilateral tanker regulation by the United States is internationally accepted and without serious international repercussions. *See* U.S. Coast Guard, Final Environmental Impact Statement, Regulations for U.S. Tank Vessels Carrying Oil in Foreign Trade and Foreign Tank Vessels that Enter the Navigable Waters of the U.S., at 77-79 (Nov. 12, 1976). On the contrary, Coast Guard Commandant Bender, Vice Chairman of the U.S. delegation, stated that it was "a central article of faith at the Conference . . . in abandoning inclusion of an article formally limiting unilateral action, that all nations would act responsibly in substantial conformance with the Convention provisions." *Hearings on the 1973 IMCO Conference, supra*, at 23.[55]

The Coast Guard's regulations for tanker design under the PWSA thus substantially conform to the standards established by the Marine Pollution Convention. The Coast Guard has emphasized the importance of avoiding unilateral U.S. action because it would "impede the ratification of the Convention by other nations", "encourage the proliferation of differing regulatory schemes imposed by individual nations," invite retaliatory actions by other nations, and otherwise adversely affect our foreign rela-

[55] Appellants' argument that the United States has consistently adhered to a policy that international treaties do not prohibit supplementary federal or state regulation of vessel design is without merit. Appellants rely principally on the International Convention for the Prevention of Pollution of the Sea by Oil (1954), but this treaty relates to tanker operational and discharge standards, not tanker design. In contrast, SOLAS does relate to vessel design and equipment, and precludes supplementary regulation of foreign flag vessels by compelling United States acceptance of foreign certificates of inspection.

tions. *Id.* at 23; *see* Coast Guard EIS at A. 215-20, 330-31. As the Coast Guard recently stated, unilateral action to prescribe tanker design standards "would inevitably destroy our power to improve maritime standards and practices on a global scale through international processes." *Hearings on Recent Tanker Accidents, supra,* at 194; *see also, id.* at 14-17.[56]

The federal government is not barred from imposing more stringent design requirements than those contained in the Marine Pollution Convention. But such action can only be taken at the federal level. Our constitutional system does not allow initiatives by each of the individual states which would so directly and adversely affect federal control over foreign relations.[57]

The Tanker Law's exclusion of foreign flag vessels over 125,000 DWT is fraught with serious international consequences, for reasons wholly apart from the Marine Pollution Convention. The United States has treaties

[56] The Carter Administration remains committed to seeking international agreement on tanker design standards. Recognizing that "[p]ollution of the oceans by oil is a global problem requiring global solutions," President Carter has submitted the 1973 Marine Pollution Convention to the Senate for ratification, and has called for a special IMCO Conference (to be held in February 1978) to consider the adoption of the Administration's proposals as international standards. 13 Weekly Comp. of Pres. Docs. 408 (1977). The Coast Guard has announced that its latest rulemaking proposals may be delayed pending "the outcome of current international negotiations directed at developing international standards of comparable scope," 42 Fed. Reg. at 24868. *See also* 123 Cong. Rec. S.8741 (daily ed. May 26, 1977) (Statement of Secretary of Transportation Adams to the IMCO Council).

[57] The Washington Tanker Law prescribes design features such as double bottoms which were "voted down by a substantial majority" at the 1973 IMCO Conference. *Hearings on the 1973 IMCO Conference, supra,* at 5. The international sensitivity of such design proposals may be seen in the protests of twelve foreign governments to the minor deviations from international design norms taken by the Coast Guard. *See Hearings on Recent Tanker Accidents, supra,* at 194.

with many foreign nations which guarantee access of their vessels to our ports. For example, the Treaty of Friendship, Commerce and Navigation with Liberia — under whose flag sail many tankers over 125,000 DWT, including Atlantic Richfield's three new 150,000 DWT tankers, see n. 8, *supra,* and most of the tankers over 125,000 DWT which called at Cherry Point prior to the Tanker Law (A. 113) — provides that Liberia "shall have liberty to freely come with [its] vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the [United States] which are or may be open to foreign commerce and navigation." 54 Stat. 1739 (1938).[58]

The Tanker Law invades the field of foreign affairs and conflicts with United States treaty obligations in one final respect. By attempting to exclude or prescribe design requirements on tankers transiting Puget Sound on their way to Canadian refineries in the Vancouver area, the Tanker Law violates the right of innocent passage guaranteed by Articles 14 and 16 of the Convention on the Territorial Sea and the Contiguous Zone, 15 U.S.T. 1606 (1964), and U.S. treaty obligations toward Canada contained in Article I of the Treaty with Great Britain in Regard to [the Canadian Boundary] Limits Westward of the Rocky Mountains, 9 Stat. 869 (1846) (navigation of the channels and straits between Vancouver Island and the American mainland shall "remain free and open to both parties"). The normal navi-

[58] The Secretary of Transportation concluded that the proposal of the State of Florida to ban from the Florida Straits large tankers headed for deepwater ports in the Gulf of Mexico would violate such United States treaty obligations. Opinion Approving Application of Seadock, Inc., *supra,* at F-3 to F-6.

The absolute exclusion of a certificated foreign vessel solely on the basis of size is also inconsistent with United States treaty obligations under SOLAS. The Tanker Law's Design Requirements likewise raise substantial questions of conflict with SOLAS, *see* p. 25, *supra,* questions which must properly be addressed only at the federal level.

gational routes taken by such tankers require transit through Washington waters subject to the Tanker Law. (A. 64-66). There can be no dispute that the Tanker Law's exclusion of tankers over 125,000 DWT bound for Canadian ports would be a fundamental abridgment of this right. The right of innocent passage likewise precludes Washington's attempt to regulate vessel design and equipment. *See* Art. 21, § 2, Informal Composite Negotiating Text, Third United Nations Conference on the Law of the Sea, A/CONF.62/WP.10 (July 15, 1977); S. Rep. No. 95-176, *supra*, at 21, 69.

V. THE ELEVENTH AMENDMENT DOES NOT BAR A SUIT AGAINST STATE OFFICIALS TO ENJOIN THEIR ENFORCEMENT OF AN UNCONSTITUTIONAL STATE LAW

The appellant state officials urge the Court to overrule *Ex parte Young*, 209 U.S. 123 (1908), the landmark case in which the Court held that a suit against state officials to restrain their enforcement of an unconstitutional state law was not a suit against the state for purposes of the Eleventh Amendment. The Court reasoned that such a suit does not present any challenge to the legitimate sovereignty of the state, and that a state official attempting to enforce an unconstitutional statute is engaging in an illegal act and thus obtains no immunity. *Id.* at 159-60.

This case does not present a proper occasion for the Court to reconsider *Ex parte Young*,[59] but even if it did, appellants suggest no reason why *Ex parte Young* should

[59] Even if suit against the defendant state officials were barred by the Eleventh Amendment, this suit is properly maintained against two appellants who are county officials, the prosecuting attorneys of Whatcom and King Counties. These appellants have not raised the Eleventh Amendment defense, either in this Court or in the court below. Nor would they be entitled to the protection of the Eleventh Amendment even if *Ex parte Young* were overruled, for it is well settled that the Eleventh Amendment does not bar a suit against a county or county officials. *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Griffin v. County School Board*, 377 U.S. 218 (1964); *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974). In any event, the King County Prosecuting Attorney affirmatively intervened in this action and thus waived any immunity to which he might otherwise be entitled.

now be overruled. The principle established by *Ex parte Young* provides an essential means to test the validity of state enactments. This Court has never doubted its continuing viability. As the Court unanimously held in *Scheuer v. Rhodes*, 416 U.S. 232, 237 (1974), "since *Ex parte Young* . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law." *See also Edelman v. Jordan, supra*, at 664; *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 304 (1952). While commentators have occasionally criticized the reasoning of *Ex parte Young*, few have doubted the fundamental wisdom and importance of its holding. *See, e.g.*, Davis, *Sovereign Immunity in Suits Against Officers for Relief Other than Damages*, 40 Cornell L.Q. 3, 36 (1954); 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction, § 3524, at 97 (1975).

Appellants' suggestion that *Ex parte Young* is limited to cases involving Fourteenth Amendment rights is frivolous. The rationale of *Ex parte Young* is based on the paramount authority of the entire federal Constitution, not just the Fourteenth Amendment; the Court expressly did not rest its decision on the contention that the Fourteenth Amendment "altered or limited the effect of the earlier [Eleventh] Amendment." 209 U.S. at 150. This Court has uniformly held the Eleventh Amendment inapplicable to suits against state officials seeking to enjoin enforcement of state statutes in reliance on claims under other provisions of the Constitution, *see, e.g., Georgia Railroad & Banking Co. v. Redwine, supra*

(Obligation of Contracts Clause); *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966) (Commerce Clause), and has unhesitatingly assumed jurisdiction of innumerable actions against state officials involving claims similar to those raised by appellees here.

The fact that Atlantic Richfield may have been entitled to bring an action in the state courts for declaratory relief — though apparently not for the injunctive relief Atlantic Richfield also sought, and obtained, in federal court — is irrelevant to the Eleventh Amendment issue, which goes to the question of the federal courts' judicial power. As this Court held in *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972), "the availability of declaratory relief in [the state] courts on appellants' federal claims is wholly beside the point." *See also Zwickler v. Koota*, 389 U.S. 241, 248 (1967).[60]

Appellants also argue that the absence of an imminent, publicly-threatened prosecution for violation of the Tanker Law bars this suit, apparently suggesting the absence of a live case or controversy. However, "the present effectiveness in fact of the statutory obligation" imposed by the state law establishes a live controversy. *Lake Carriers' Ass'n v. MacMullan, supra*, at 507. A publicly-threatened prosecution has never been required. See *Ex parte Young, supra* at 163; *City of Altus v. Carr, supra*, 255 F. Supp. at 836-37. As a practical matter, there can be no doubt that appellants would have immediately taken action to enforce the Tanker Law had Atlantic Rich-

[60] There is no ambiguity in the Tanker Law or any question of interpretation that might avoid the constitutional issues raised, as would justify traditional judicial abstention. *See Douglas v. Seacoast Products, supra*, 45 U.S.L.W. at 4489 n. 4; *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973). Nor, in the absence of any pending state proceeding, is abstention under *Younger v. Harris*, 401 U.S. 37 (1971) and *Juidice v. Vail*, 45 U.S.L.W. 4269 (U.S. Mar. 22, 1977), appropriate here. *Lake Carriers' Ass'n v. MacMullan, supra*, at 509.

field chosen to violate its provisions rather than to seek judicial relief. Appellants specifically advised the three-judge court below that they would "continue to enforce the state statute" pending appeal from the court's declaratory judgment, unless enjoined. Letter of Charles B. Roe, Jr., Counsel for Appellants, to the Three-Judge Court, September 29, 1976.[61]

Finally, this Court has indicated that in determining whether a suit is brought against a state for purposes of applying the Eleventh Amendment, it is appropriate to look to the law of the state in question. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 463 (1945). Under Washington law, "when the constitutionality of a statute is challenged the action is not one against the state; rather, it is one against the named defendant individually . . .". *Hanson v. Hutt*, 83 Wash. 2d 195, 202, 517 P.2d 599, 604 (1974). It is singularly inappropriate for defendants to suggest that the Eleventh Amendment affords them immunity from suit in this Court when the Washington Supreme Court does not consider such a suit to be a suit against the State.

[61] Appellants also contend that there is no certainty of irreparable injury to plaintiffs here. This contention goes to the availability of injunctive relief, not to the Eleventh Amendment issue relating to the courts' judicial power. It is well established that Atlantic Richfield was not required to attempt to find an agent willing to risk criminal prosecution by violating the law in order to test it. *Ex parte Young, supra*, at 163-65. And the present impact of the Tanker Law on Atlantic Richfield's operations – excluding from Washington waters Atlantic Richfield's 150,000 DWT tankers and imposing unrecoverable tug escort costs on use of smaller tankers – was sufficient to justify the injunctive relief issued by the three-judge court. In any event, irreparable injury is not a prerequisite to declaratory relief. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974).

VI. CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

Respectfully submitted,

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August 1, 1977

APPENDIX*

* Copies of the originals of these documents have been filed with the Clerk to be available for the Court's inspection and have been served on the parties.

Each is a Coast Guard business record and the best available evidence of official Coast Guard actions, and is thus subject to judicial notice by the Court. *Cf.* Rule 201 of the Federal Rules of Evidence. Reference to the navigation charts in the Appendix Attachment shows that buoy "RB" referred to in ¶ 14 of the Coast Guard December 3, 1976 letter, ¶ 18 of the Coast Guard April 6, 1977 letter, and the February 22, 1977 VTS Watch Officer's Work Book, is at the entrance to Rosario Strait. Ferndale, Washington, is immediately adjacent to Cherry Point.

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

(SEAL)

Mailing Address

Captain of the Port
U.S. Coast Guard
Bldg. 1, Pier 36
1519 Alaskan Way S.
Seattle, WA 98134

16616
3 December 1976

Olympic Steamship Co., Inc.
1000 2nd Ave.
Seattle, WA 98174

Attention: Mr. Warren Johnson

Dear Sir:

As confirmation of the points discussed in our meeting of 29 November 1976, related to the transit of LPG carriers to the Cal Gas facility, Ferndale, WA, the following requirements and/or restrictions will be imposed:

1. A conference will be held prior to each arrival of an LPG carrier to delineate all requirements. Participants will include representatives of the Coast Guard, ship's agent, and vessel operator. (After sufficient conferences have been held, as determined by the COTP, Seattle, the conferences will be scheduled on an "as necessary" basis.)

2. Not less than 10 days prior to the vessel's arrival, the facility or vessel's agent must submit to the COTP an application for a permit to handle dangerous cargo. (CG-4260)

3. An emergency contingency plan is required for use in the event of a spillage, leakage or any accident resulting in the discharge of product. A copy of this plan must be on file with the Captain of the Port.

4. Each foreign flag vessel concerned must possess a valid Letter of Compliance, issued by the Commandant, U. S. Coast Guard, for carriage of the specific product to be loaded or discharged.

5. All vessels must possess a Certificate of Financial Responsibility and be able to produce same upon demand.

6. The vessel's Master or Agent shall have the authority from the owner/operator to immediately enlist commercial assistance in an emergency situation or when so directed by the COTP, Seattle.

7. The loaded draft of the vessel shall be no greater than that which would permit safe navigation at mean low water.

8. The carrier, shipper, or agent must notify the COTP, Seattle 72 hours in advance of the ship's arrival at buoy "J". The time of arrival must be confirmed 10 hours prior to arrival at buoy "J".

9. The vessel shall proceed directly to the discharge terminal, discharge her cargo and depart without undue delay.

10. Continuous radio guard must be maintained on Channel 16 (156.8 Mhz) and Channel 13 (156.6 Mhz) while underway from buoy "J" to moorage.

11. The vessel shall be required to participate in the Strait of Juan de Fuca Traffic Separation Scheme from buoy "J" to the pilot station at Port Angeles. From the pilot station to her moorings the vessel shall participate in the mandatory Puget Sound Vessel Traffic Service.

12. Loaded vessels will transit from buoy "R" to moorage during daylight hours only. After discharge, an empty vessel may depart at anytime.

13. The LPG carrier shall be treated as a 75,000 dwt crude carrier for her transit of Rosario Strait, that is, there will be only one way traffic during her transit.

14. A tug escort is required for each LPG vessel from buoy "RB" to the Cal-Gas moorings.

15. The vessel shall be moored in such a manner as to permit getting underway on short notice.

16. Prior to handling cargo, the shore piping which is to be used in the operation shall be checked for proper operation of automatic controls, gas detectors, and instrumentation. If any part of the system contains air, it should be purged prior to handling the product by an inert gas or, in special circumstances, by low pressure LPG vapor. Care shall be taken in purging to minimize the volume of flammable mixture present at any time. Following purging, piping shall be gradually cooled to prevent thermal stress.

17. Insure that a qualified cryogenics supervisor is in attendance during all cryogenics cargo transfer.

18. A Coast Guard representative must be on scene during transfer operations.

19. The ship's Master, Cargo Officer, or Supervisor, as designated by the Master, must be on board throughout the entire discharge operation.

20. All equipment used in the vicinity of the transfer operation must be explosion proof.

21. All personnel directly involved in the transfer operation must speak English or a qualified interpreter must be present.

22. The dockman and the vessel's designated person-in-charge must be in constant communication with each other.

23. There shall be no other cargo transfers or vessel movements at the same facility during the transfer of LPG.

24. There will be no welding, hotwork, burning, smoking, open lights, or similar activity permitted while the vessel is alongside the terminal.

25. Upon completion of all cargo transfers, the product line from pier head to storage tank loading stations shall be unloaded into closed containers and not vented to the atmosphere.

If any further questions arise, feel free to contact me at the address or phone number above, or LT Morton or ENSIGN Nesel of my staff at 442-1853.

Respectfully,

RICHARD F. MALM
Captain, U. S. Coast Guard
Captain of the Port
Seattle, Washington

copy to:
CCGD13(m)
PSVTS, Seattle

DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

(SEAL)

Mailing Address

Captain of the Port
c/o Coast Guard Group
1519 Alaskan Way S.
Seattle, WA 98134

16616
6 April 1977

Olympic Steamship Co., Inc.
1000 2nd Ave.
Seattle, WA 98174

Attention: Mr. Warren Johnson

Dear Sir:

This letter supersedes my letter of 3 December 1976 and states the baseline requirements for any future shipments of Liquefied Petroleum Gas (LPG) to the California Liquefied Petroleum Gas (CALGAS) facility, Ferndale, WA. The following requirements and/or restrictions will be imposed:

1. Prior to each arrival of an LPG carrier, a conference will be held to review standard requirements and delineate such additional requirements as may be necessary/appropriate. Participants will include representatives of the Coast Guard Captain of the Port, Seattle (COTP), ship's agents, vessel operator, and the Puget Sound Pilot's Association and such other parties as may be appropriate. (After sufficient experience has been gained, as determined by the COTP the conferences may be scheduled on an "as necessary" basis.)

2. The vessel's agents are responsible for the notification of all parties with an interest in the vessel's movement and operation, including, but not limited to the Puget Sound Pilot Association, Intalco, tug operators, LPG vessel master, etc. Notification as used here, means *all* information relating to the arrival, transit, cargo discharge, departure and any other activity related to the LPG carrier. When notification is by record means a copy is to be furnished to the COTP as soon as practicable.

3. An approved Emergency Contingency plan is required for use in the event of a spill, leakage or any accident resulting in the discharge of product at anytime while in United States waters. A copy of this plan must be on file with the Captain of the Port, Seattle.

4. Each foreign flag vessel concerned, must possess a valid Letter of Compliance, issued by the Commandant, U. S. Coast Guard, for carriage of the specific product to be discharged.

5. All vessels must possess a Certificate of Financial Responsibility, issued by the Federal Maritime Commission, and be able to produce the same upon demand.

6. The vessel's Master or Agent shall have the authority from the owner/operator to immediately enlist commercial assistance in an emergency situation or when so directed by the COTP.

7. The loaded draft of the vessel shall be no greater than that which would permit safe navigation at mean low low water.

8. Not less than 10 days prior to the vessel's arrival, the facility or vessel's agent must submit to the COTP an Application and Permit to Handle Explosives or other Dangerous Cargo (CG-4260).

9. The carrier, shipper or agent must notify the COTP 72 hours in advance of the ship's arrival at Buoy "J". The time for arrival must be confirmed 10 hours prior to arrival at Buoy "J".

10. Continuous radio guard must be maintained on Channel 16 (156.8 MHZ), Channel 13 (156.6 MHZ) and Channel 14 (156.7 MHZ) (on and after 1 July 1977) while underway or anchored between Buoy "J" and the discharge facility, or when anchored prior to arrival at the discharge facility.

11. The vessel shall participate in the Strait of Juan de Fuca Traffic Separation Scheme (TSS) from Buoy "J" to the pilot station at Port Angeles. From the pilot station to her moorings the vessel shall participate in the mandatory Puget Sound Vessel Traffic Service (PSVTS).

12. The vessel shall proceed directly to the discharge terminal, discharge her cargo and depart without undue delay.

13. In the event of high winds or storm conditions, the vessel's Master shall advise the COTP via PSVTS of the vessel's seaworthiness, ability to maneuver, navigate safely and/or any condition which could result in an undue hazard to the vessel, the surrounding environment and/or people and property within the potential sphere of action. If necessary the vessel will be directed to anchor in one of the following locations: Freshwater Bay or west of Cherry Point.

14. In the event of reduced visibility (visibility less than one NM) the LPG carrier shall not enter Rosario Strait until visibility has improved. If the vessel is in Rosario Strait and visibility decreases to less than one NM a manned radar navigation watch shall be set.

15. A Coast Guard Boarding Officer(s) will ride the vessel from Port Angeles to the vessel's moorings. The number of Boarding Officers will be determined at the meeting described in paragraph 1. The Coast Guard Boarding Officer(s) will conduct Letter of Compliance

inspections and pre-offloading checks to expedite cargo transfer. The Coast Guard Boarding Officers will not direct or control the movement of the LPG vessel.

16. The LPG vessel will transmit from Buoy "R" to her berth at Intalco during daylight hours only. Daylight is defined as from the beginning of morning nautical twilight to the end of evening nautical twilight. The exact time will be determined at the meeting described in paragraph 1.

17. The LPG carrier *must* transit via Rosario Strait. Traffic will be managed so that she will not meet or overtake any other vessels during her inbound transit between Buoys "RB" and "C".

18. A tug escort is required for each LPG vessel from Buoy "RB" to the Cal Gas moorings. The tug shall be of sufficient size to assist the vessel in emergency situations. The LPG carrier *and* the tug must be rigged and manned so that a meaningful connection can be made between the two in a prompt, timely manner.

19. During the inbound transit the LPG carrier anchor shall be rigged and manned for letting go on short notice.

20. The vessel shall be moored in such a manner as to permit getting underway on short notice.

21. Prior to transfer, the shore piping which is to be used in the operation shall be checked for proper operation of automatic controls, gas detectors, and instrumentation. If any part of the system contains air, it should be purged prior to handling the product by an inert gas or, in special circumstances, by low pressure LPG vapor. Care shall be taken in purging to minimize the volume of flammable mixture present at any time. Following purging, piping shall be gradually cooled to prevent thermal stress.

22. Prior to transfer, all fire fighting equipment shall be checked for accessibility and operation.

23. A COTP representative will be on scene during all transfer operations. He has the authority to stop the transfer operation at any time, for cause.

24. A qualified cryogenics supervisor must be in attendance during all cryogenics cargo transfers.

25. The ship's Master, Cargo Officer or Supervisor, as designated by the Master, must be onboard throughout the entire discharge operation.

26. All equipment used in the vicinity of the transfer operation must be explosion proof. All deck scuppers shall be plugged.

27. Display a red flag (day) and red light (night) so that it will be visible from all directions at all times during transfer operations.

28. All personnel directly involved in the transfer operation must speak *and* understand English or a qualified interpreter must be present.

29. There shall be no other cargo transfers or vessel movement at the same facility during the transfer of LPG.

30. There will be no welding, hotwork, burning, smoking, open lights, or similar activities permitted while the vessel is alongside the terminal.

31. Upon completion of all cargo transfers the product line from pier head to storage tank loading stations shall be unloaded into closed containers and not vented into the atmosphere.

32. Upon offloading of all product, the vessel will depart without undue delay and proceed directly to sea. Daylight transit of Rosario Strait is not required of an outbound, empty LPG vessel.

If any further questions arise, contact me at the address or phone number above, or my Marine Safety or Port Safety Officers at 442-1853.

Respectfully,

RICHARD F. MALM
Captain, U. S. Coast Guard
Captain of the Port
Seattle, Washington

Copy to:

CCGD13(m)
PSVTS, Seattle
MIO, Seattle
Puget Sound Pilots Association
PSD Anacortes

[UNITED STATES COAST GUARD]

VTS WATCH OFFICER'S WORK BOOK

22 Feb 77

0000-0800

Relieved Lt. Young. Equipment as per CASREPT log. 29 vessels. **2350** [21 Feb] Sent initial msg concerning Valerie F. **0030** Informed Pilot Sta of plans for Valerie F. They don't know which pilot it will be yet, and whoever he is, he's asleep, so a note was left for him. **0115** Informed Valerie F of tug assist requirement. He seemed quite agreeable. Also told him winds were reported at this time to be 20-40 kts in Rosario. **0140** COTP OOD called to say CAPT Malm [Puget Sound Captain of the Port] agrees w/VTS "recommendation" concerning Valerie F, and that if there is any trouble, we can use his personal authority. **0545** Pilot has made arrangements for Stacey Foss to assist Valerie F, who has slowed down for rendezvous at [buoy] Rb approx 1000.

C. D. Main

0800-1600

Relieved Lt. Main. Eqp as per CASREP log. 27 vsls on plot. Generally high winds in sound/straits. Tug/Barge "Valerie F" transiting under special instructions not to transit Rosario without escort. Presently sitting at "RA" waiting for Stacey Foss. **0802** Stove Transport inbound at "J" for Victoria reports force 6 wx (from NNW) her cargo — packaged lumber — is loose on deck (no problem at present) vsl inbound to secure cargo. Advised COTP/RCC for info purposes.

K.R. Grover

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DEPARTMENT OF
TRANSPORTATION
U.S. COAST GUARD
CG-4380A (Rev. 8-67)

LOG — REMARKS SHEET

Vessel/Station	Zone Description	Day of Week	Date
USCG Port Safety Station	+8 (u)	Mon-Tue	21 0900(u) to 22 0900(u) Feb 77

REMARKS

22 FEBRUARY 1977

0020 Notified by VTC of integrated barge/tug Valarie F enroute Bellingham. Subject suffered casualty to starboard shaft. Due to lack of maneuverability and on scene weather, subject directed to have tug or wait until winds are less than 15 kts. Report passed to COTP Seattle.

0235 Received report of 14 foot boat adrift in vicinity of First Ave S. Bridge, Duwamish River. Intend to investigate in conjunction with search for pollution source in vicinity at first light 22 February 1977.

0819 CG 41388 u/w for Harbor Patrol. Coxswain directed to watch for boat reported adrift in the vicinity of the First Ave. S. Bridge and to conduct waterside survey of vicinity around Ex Atr-87 for possible pollution sources.

0820 Notified by reporting party that Dr. Scott had been located. Closed UCN 0222.

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